CHARLES ELMORE CROPLEY
CLERK

NO. 653

IN THE

Supreme Court of the United States

October Term, 1945

GAS RIDGE, INC.,
Petitioner,

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals, Fifth Circuit, and Brief in Support Thereof.

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FIRM FOUNDATION—AUSTIN

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals, Fifth Circuit, and Brief in Support Thereof.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Gas Ridge Inc., a Wisconsin private corporation, respectfully prays this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, for

the reasons hereinafter stated.

The brief in support of the petition begins at page 10 hereof.

Emphasis within quotations in the petition and brief has been supplied, unless otherwise indicated.

I

JUDGMENT BELOW.

The judgment sought to be reviewed, affirming a decree of the District Court of the United States for the Western District of Texas dated October 4, 1944, was entered July 12, 1945 (R. 194 to 200). Petitioner's motion for rehearing was denied September 13, 1945, with a dissenting opinion by Circuit Judge Sibley (R. 269 to 271).

II

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The questions presented relate to a contract dated December 7, 1920, for the drilling of an exploratory well for oil or gas upon a tract of 2070 acres, more or less, situated in Bexar County, Texas, and to subsequent development operations thereon and the marketing of oil and gas therefrom. The issues to be presented here are ones of law involving construction of the contract in question under the undisputed facts.

The original lessor (Hamilton Land & Development Company) was the predecessor in title of respondent. Petitioner is the successor in title and right of the original lessee, San Antonio Oil & Natural Gas Company.

It is conceded that oil or gas had been continuously marketed from the property to the date of trial by petitioner and its predecessors for some twenty-three years, the oil by truck transport to a nearby refinery and the gas to United Gas Pipe Line Company (and its predecessors), for transmission to neighboring United States military establishments and to San Antonio, about twelve miles distant from the property involved.

When the case was tried there were twelve shallow oil wells and six shallow gas wells on the property, the oil and gas from which had been continuously produced and marketed, as aforesaid for many years. Petitioner owned and operated several other leases in the immediate area, upon which were situated a number of producing oil and gas wells, the production from which had been marketed in like manner and during substantially the same period. The oil throughout the area was produced from an average depth of 450 feet and the gas from approximately 750 feet. Oil was being produced and marketed in like manner by other operators in the field. Petitioner was the only producer of gas, its entire output, including that from the lease in controversy, being sold to United Gas Pipe Line Company, for transmission and use as aforesaid.

The case was tried to the Court, resulting in a decree of cancellation and removal of cloud, whereby petitioner's leasehold estate and its rights thereunder were lost, inclusive of the said eighteen oil and gas wells (R. 183-186).

By its trial complaint, respondent charged that for more than five years petitioner had operated the lease in question here at a recurring and continuing net loss, in that it had failed to produce oil and gas, or either, in paying and commercial quantities, wherefore respondent contended that petitioner's leasehold estate should be cancelled and its rights and interests thereunder forfeited and the cloud on respondent's title resulting therefrom removed (R. 16-20).

By its amended answer, petitioner joined issue upon the recited grounds for cancellation (R. 21). There were other defenses urged, which will be noted only incidentally as they involve disputed evidentiary and procedural questions.

The judgment of the District Court was that the lease (insofar as it covered 1820.8 acres) permanently ceased to produce either oil or gas, or both oil and gas, in paying and commercial quantities, more than five years prior to the date of the decree (October 4, 1944), and adjudged its cancellation and removal as a cloud upon respondent's title (R. 183-186).

III

BASIS OF JURISDICTION OF THE SUPREME COURT.

The Judicial Code, Section 240, as amended by Act of February 13, 1925, 43 Stat. 938 (U. S. C. A., Title 28, Section 347; Supreme Court Rule 38, subd. 5 (b).

IV

QUESTIONS PRESENTED.

First Question.

Has the Circuit Court of Appeals by its decision in this case decided an important question of local law in a way probably in conflict with applicable local decisions?

Second Question.

Has the Circuit Court of Appeals by its decision in this case so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for exercise by the Supreme Court of its power of supervision?

V

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

First Question

The issues of law arising hereunder is of very grave importance in its bearing upon the title status of many of so-called "stripper leases" in Texas as well as throughout the Mid-Continent oil and gas area generally, arising from the decision of the Circuit Court of Appeals that the determinable fee in minerals inuring to the lessee in contracts of this nature may be lost by forfeiture to the lessor under circumstances where:

(a). There is absent from the contract any provision of forfeiture because of the conditions upon which the decision of the Circuit Court was based; and

(b). There are present in the contract specific, unambiguous provisions clearly indicating the intent of the parties that the determinable fee estate acquired by the lessee thereunder would not terminate because of the happenings upon which the decision of the Circuit Court was based.

The vital importance of this question to the oil and gas industries can hardly be over-emphasized. The Court judicially knows that there is hardly an industrial activity to which title assurance is more essential than in the production and marketing of oil and natural gas, nor where even the breath of

suspicion will result more disastrously, particularly to the smaller concerns who sustain the heavy burden of maintaining on production that type of lease commonly known as a "stripper," indicating operation over many years with attendant gradual decline in output and thus distinguished from "flush" production.

Authoritative local decisions prevailing over a substantial period become a rule of property upon the faith of which the citizen must perforce make his investments and conduct his business activities. The decision of the Circuit Court here, it is most earnestly submitted, has the effect of overturning long established precedents, as declared by the Supreme Court of Texas, for the interpretation of contracts such as that involved here, which will probably result in rendering uncertain the applicable principles of law which hitherto had been generally regarded as settled, an assertion which petitioner will endeavor to sustain in the supporting brief.

Second Question.

That in its decision the Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the district court in this case, as to call for an exercise by this Court of its supervisory power, is indicated by the following:

The Circuit Court sanctioned and approved the action of the trial court in materially changing the written agreement between the parties by subtracting therefrom the word "or" and substituting the

word "and," whereby, assuming arguendo that the phrase "in paying quantities" could be implied in the circumstances, the contract was made to speak an entirely different meaning in relation to the condition of forfeiture upon which its cancellation was based, in that the word "or" as used in the context permitted the implied condition of production "in paying quantities" to be met by such quantum of natural gas, whereas by substitution therefor of "and" such implied quantum could be met only by the requisite production of both oil and natural gas.

There is no principle more firmly established in American jurisprudence, nor one more essential to maintenance of orderly and equitable judicial procedure, than that the courts will not be permitted, in the guise of interpretation, to so in effect rewrite contracts as to give to them a legal meaning different from that manifestly intended by the parties from the language used in making formal written records of their undertakings. This principle is elementary in its universal acceptation. As so clearly and forcefully pointed out by Judge Sibley in his dissenting opinion on the petition for rehearing, the effect of the judgment below and its sanctioning by the Circuit Court, was to relieve respondent of the burden of establishing, to justify the harsh remedy of forfeiture which it sought and obtained, that there was paying production of neither oil nor gas, and to authorize the expropriations of petitioner's property in the absence of such showing, assuming that the contract was conditioned at all upon the production of oil or gas in paying quantities, which petitioner most earnestly submits is not true.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, directing the said court to certify and send to the Supreme Court of the United States for its review and determination a full and complete transcript of the record and proceedings in the said Circuit Court in this cause (numbered on its docket 11,232 and entitled Gas Ridge, Inc., appellant, versus Suburban Agricultural Properties, Inc., appellee); that the decree of the Circuit Court be reversed and your petitioner be awarded such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (Circuit Judges Samuel H. Sibley, Joseph C. Hutcheson and Elmo P. Lee, Judge Hutcheson writing the opinion of the Court) was filed July 12, 1945, and appears at page 194 to 200 of the record.

The dissenting opinion of Judge Sibley on petition for rehearing (denied by the majority September 13, 1945) was filed on said date and appears at page 269 to 271 of the record.

II.

JURISDICTION.

The jurisdiction of the Supreme Court is invoked under the Judicial Code, Section 240, as amended by Act of February 13, 1925, 43 Stat. 938 (U. S. C. A. Title 28, Section 347; Supreme Court Rule 38, subd-5 (b).

III.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED.

The grounds relied upon for invoking the jurisdiction of this Court have been set forth at pages 5 of the preceding petition. To recapitulate, they are that the Circuit Court by its decision in the case.

FIRST.

Has decided an important question of local law in a way probably in conflict with applicable local decisions.

SECOND.

Has so far departed from the accepted and usual course of judicial proceedings, or has so far sanc-

tioned such a departure by a lower court, as to call for an exercise by the Supreme Court of its power of supervision.

IV.

STATEMENT OF THE CASE.

The drilling contract the construction of which is involved here (the text being appended) is dated December 7, 1920 (R 34), Respondent's Ex. 1, pp. 1, 2 Exhibit Appendix). Excerpts therefrom pertinent to and controlling its interpretation as contended for by petitioner, are as follows:

> ". . . does grant, demise, lease and let . . . for the sole purpose of mining and operating for oil and gas . . . being the same property described more particularly in the deed from the Duluth & Texas Oil Company of Texas to said Hamilton Land & Development Co. (the lessor) . . . . *including the existing wells and personal property on said premises*, 'said lease to continue' for the term of five years from this date and as long thereafter as oil *or* gas is produced . . . *either from the existing wells upon said premises* or future wells to be drilled thereon."

> ". . . the lessee may sell and dispose of all oil and gas produced and shall account to lessor, out of the proceeds of such sales . . . . after deducting lessor's *proportionate* share of transportation and marketing cost thereof."

> "The lessee agrees to commence actual drilling upon said property of an oil or gas well . . . . to a depth of not less than twelve hundred feet unless oil or gas *in paying quantities* be found

or produced by lessee at a lesser depth, and upon completion of said well said lessee shall continue the development of said property *until said property has been reasonably developed.*"

"Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises *from any exhausted or dry well* or other operations including right to withdraw or remove casings."

"The lessee shall have the right to assign this lease in whole or in part and the development obligations hereinabove provided for shall be deemed to have been complied with whether performed by lessee *or any of its assigns.*"

The contract covered 2070 acres, more or less. Respondent sought cancellation insofar as it covered 1820.8 acres (R 16, 18).

There were six gas wells and twelve oil wells on the property when the case was tried (R 51). The natural pressure of the gas wells ranged from 30 to 80 lbs. per sq. in, with open-flow capacities from 5,000 to better than 40,000 cubic feet per day. The gas is sold to the United Gas Pipe Line Company, it being necessary for the latter to boost the pressure by compression for induction into its transmission lines. Compared to the cost of operating the oil wells operation of the gas wells costs very little (R 56-57).

Respondent sought cancellation upon the ground that "during such period of more than five years the defendant has operated said lease at a recurring and continuing net loss, such that for more than five

years said lease has failed to produce oil and gas, or either of them, in paying and commercial quantities" (R 19-20).

The trial court found that the *controlling* provision of the lease as to its *term* and *duration* is as follows (R. 177):

> ". . . lessor does grant, remise, lease and let unto lessee . . . for the sole purpose of mining and operating for oil and gas . . . that certain tract of land (described in the complaint) . . . . said lease to continue for the term of five (5) years from this date (December 7, 1920), and as long thereafter as oil *and* gas is produced from said leased premises by the lessee . . ."

The trial court concluded:

> "1. The mineral leasehold estate *automatically* terminated and expired by virtue of its own *terms, provisions* and *limitations*, upon the cessation of *production* in paying quantities, which occurred more than five years ago" (R. 182).

V.

ASSIGNMENTS OF ERROR.

First Assignment.

The Circuit Court of Appeals erred in affirming the judgment of the District Court and in not holding as a matter of law under the undisputed and conceded facts that respondent is not entitled to cancellation of the lease contract involved herein, because:

(3) The terms and provisions of said contract specifically provide and clearly show the intention of the parties that the estate of the lessee should continue so long as oil or gas was being produced from the leased premises; and

(b) It is without dispute that oil or gas had been regularly and continuously produced and marketed from said premises for a period of approximately twenty-two years prior to the trial (First Assignment of Error in petitioner's motion for rehearing in the Circuit Court of Appeals, First Proposition, at page one (R 203).

Second Assignment

The Circuit Court of Appeals erred in affirming the judgment of the District Court and in not holding as a matter of law under the undisputed and conceded facts that respondent is not entitled to cancellation of the lease contract involved herein, because, if it be assumed, contrarily to the legal effect of the lease, that the implied term "in paying quantities" operated as a limitation upon the duration of the determinable fee estate acquired by petitioner under the contract, or as a condition subsequent entitling respondent to reentry for a breach, but considering that such quantity of production of either oil or gas would satisfy the condition; that for some ten years prior to the trial petitioner had continuously produced and marketed from the premises large volumes of gas; and that there was no appreciable, definable expense attached to the production and marketing thereof, respondent failed to sustain the burden of showing that the lease had terminated for want of production of gas in paying

quantities. (First Assignment of Error in petitioner's Motion for Rehearing in Circuit Court of Appeals, second proposition at page 23" R

THE EVIDENCE.

Pertinent to First Assignment

The lease was placed in evidence by respondent as its Exhibit 1 and appears in the Exhibit Appendix to the record at pp. 1-2 thereof (R 34). For convenient reference, copy of the text is also appended hereto.

Oil and gas have been produced from the premises for some twenty-three years (Respondent's trial complaint, R 19; Findings of the Trial Court (R 178-179). There were twelve oil wells and six gas wells on the premises at the time of the trial (R 51), the production from which had been and was being regularly marketed, the oil to a nearby refinery and the gas to the United Gas Pipe Line Company.

All of the capital stock of respondent is owned by the Alamo National Bank. The latter holds a mortgage against the land to secure a debt of some $95,000.00. The Bank acquired title June 19, 1937, the conveyance being made subject to outstanding mineral leases (R 124; respondent's Exhibit 10, at page 20 of the Exhibit Appendix to the record); and in turn conveyed to respondent by deed dated July 8, 1937 (R 116; respondent's Exhibit 18, at page 63 of of the Exhibit Appendix to the record). The principal concern of the Bank was to get rid of the lease because its existence, held by shallow oil and gas wells, hindered disposition of the fee and recoupment of its debt (R 159-160). Negotiations were had

between the Bank and representatives of petitioner for the drilling of a deep test on the property, which proved fruitless (R 159).

Respondent placed in evidence certificates from the Texas Comptroller's office showing the oil runs in barrels and the gas sales in cubic feet from several of petitioner's leases, including the one in controversy, for the period beginning January, 1941, and extending through March, 1944 (R 66-67; respondent's Exhibits 6 and 7, at pp. 8-9 and 10-11, respectively, of the Exhibit Appendix to the record), showing the production and disposition of substantial amounts of oil and gas.

VI.

ARGUMENT.

Summary of the Argument Under First Assignment.

The construction of the Circuit Court of Appeals of the lease contract here involved is not in accord with the decision of the Supreme Court of Texas in W. T. Waggoner Estate v. Sigler Oil Co., 19 S. W. (2) 27 (reversing the Commission of Appeals, 284 S. W. 921, and affirming the Court of Civil Appeals, 276 S. W. 936), where the following controlling principles in a comparable fact situation were stated, indicated by the following excerpts from the opinion, which are here copied for convenient consideration:

> "The following propositions must be regarded as settled by repeated decisions of the Supreme Court:

"1. Such a writing as that here called a lease operated to invest the party called lessee and his assigns with title to oil and gas in place".

"2. The estate acquired by the so-called lessee and his assigns was a determinable fee, which was lost on cessation of the use of the land for purposes of oil and gas exploration, development and production".

"3. (Inapplicable here).

"4. When a mining lease provided for oil or gas royalties, and failed to define the lessee's duty as regards development after discovery of paying oil or gas (the instant lease required reasonable development, but without condition of forfeiture for failure to comply), the law implied the obligation from the lessee to continue the development and production of oil or gas with reasonable diligence".

"5. Breach of the lessee's implied obligation for reasonable mineral operations will not authorize the forfeiture of the lease as for breach of condition subsequent, such obligation being a covenant".

"6. The usual remedy for breach of the lessee's implied covenant for reasonable development of oil and gas is an action for damages, though, under extraordinary circumstances—where there can be no other adequate relief—a court of equity will entertain an action to cancel the lease in whole or in part" (28-29).

The court said further:

"Contractual implications are justified only on the ground of necessity. 13 C. J. 558. Mr.

Merrill suggests that the true basis of the whole doctrine of implied covenants in oil and gas leases may be found in the determination of courts to enforce fair dealing between lessor and lessee which could not otherwise be assured. Merrill's Covenants Implied in Oil and Gas Leases, Sec. 112, p. 266. While necessity and fair dealing alike require the implication of the obligation by the lessee in leases such as the one now before the court for reasonable diligence in oil and gas exploration, development and production, yet neither necessity nor fair dealing requires the further implication that such obligation shall operate as a limitation on the estate acquired by the lessee" (32).

"The court ought not to conclude that the parties intended to prescribe a test for termination of the interests granted which could only be applied with the utmost uncertainty or confusion. Yet, if reasonable diligence in performing every one of the lessee's exploring, developing, producing and marketing operations was the test, neither lessor nor lessee could at any time have clearly or certainly known whether the estate granted was alive or ended. Such a test must inevitably diminish—if not destroy—the value of the rights of all parties derived from a mineral lease" (30).

And in *Decker* v. *Kirlicks*, 216 S. W. 385, the Supreme Court of Texas said (re provisions of an oil and gas lease):

"If the provision is ambiguous that alone condemns it as a forfeiture provision. A forfeiture should rest on sured ground. Where a contract is so vague in its terms that a court cannot determine its meaning, it would be unjust to enforce a forfeiture under it against one whose

only fault has been possibly to mistake its meaning. Forfeitures are harsh and punitive in their operation. They are not favored by the law, and ought not to be. The authority to forfeit a vested right or estate should not rest in provisions whose meaning is uncertain and obscure. It should be found in language which is plain and clear, whose unequivocal character may render its exercise fair and rightful" (386).

It would serve no useful purpose to multiply the numerous authoritative Texas cases in which these principles have been applied to a wide variety of factual situations. Many such are collated in 10 Tex. Jur., Sec. 164, p. 282.

It is stated to be a settled rule that language used in expressing their agreement will be construed in the light of the facts and circumstances surrounding the parties when the contract was made, the terms of the agreement being ambiguous or doubtful (10 Tex. Jur., Sec. 168, p. 290; *Merchants' Life Ins. Co.* v. *Griswold* (Comm. App., opinion adopted Tex. Sup.), 237 S. W. 232, quoting with approval statement of the rule in *McGregor* v. *Union Life Ins. Co.*, 120 Fed. 493-6, 57 C. C. A., 613-6; and in *Lockwood* v. *Railway*, 103 Fed. 243, 43 C. C. A. 202.

Applying the foregoing principles of construction to the drilling contract involved here, it may be noted:

(a) The agreement contains no provision of forfeiture whatsoever, even for failure to drill the first well;

(b) The lessor not only grants and demises the premises for oil and gas exploration, production and marketing, but included in the conveyance by express reference an undisclosed number of oil and gas wells and personal property situated on the premises when the grant was made;

(c) The duration of the lessee's estate was specifically and unambiguously fixed for a term of five years and as long thereafter as oil or gas should be produced from the property, *either from the existing wells* or future wells to be drilled thereon;

(d) In the contingency stated (failure to provide its own storage or receptacles), the lessor was required to participate proportionately in the transportation and marketing costs of oil and gas;

(e) Lessee was not authorized to remove machinery and fixtures placed on the premises, or to withdraw casing, save from an *exhausted or dry well* (the legal effect of this provision was adjudicated against the right of removal from a *producing* well in Wisconsin-Texas Oil Co. et al. (petitioner's predecessors) v. Clutter (Tex. Civ. App.), 258 S. W. 265, the case being remanded by the Supreme Court of Texas on another point);

(f) The lease was assignable in whole or in part, and the required reasonable development (failing which no provision of forfeiture was provided) would be satisfied whether performed by lessee, or *any* of its assigns; and

(g) The phrase "in paying quantities" appears elsewhere in the lease disassociated from the duration clause, in connection with the drilling of the first well, but without condition of forfeiture for failure to drill said well; and it may be recalled *that the grant included a number of oil and gas wells then on the property*, the legal title to which under all of the authorities vested in petitioner's predecessors and continued so long as they, or any of them might actually *produce* for marketing oil *or* gas therefrom and subject to loss only by voluntary abandonment or complete cessation of use of the premises for purposes of the grant.

It is undisputed that there was no gas transmission line in the area when the contract was made on December 7, 1920, and it would appear clear, therefore, that as to gas particularly the parties did not have in mind use of the word "produce" in the implied sense of "in paying quantities," because there was then no possible yardstick whereby the existing and contemplated gas production could have been equated in this respect, irrespective of quantity, because of the unknown factors of pipe line outlet, price, the capital investment requirement for a gathering system and such like items as would necessarily enter into the problem.

There is another very compelling reason why "in paying quantities" should not by implication be read into the duration clause of the contract, and that is, the minds of the parties having been directed to that status by use of the term as the criterion for cessation of drilling the first well short of a depth of twelve hundred feet, without condition of forfeiture

for failure to comply, it should not be assumed that they unintentionally omitted the phrase from the provision of the contract defining the duration of the estate granted. It cannot be gainsaid that they had in contemplation "paying quantities" when they made the agreement, in relation to the first well; wherefore, the presumption would appear to be inescapable that they did not intend to apply that measure to another phase of the contract from which it was absent (*State* v. *Mauritz Wells Co. et al.* (Tex. Sup.), 175 S. W. (2) 238; *Fleming* v. *Ashcroft et al.* (Tex. Comm. App., opinion adopted by Tex. Sup.), 175 S. W. (2) 401; *Dallas Joint Stock Land Bank* v. *Harrison* (Tex. Sup.); 156 S. W. (2) 963;

Respondent and the Circuit Court rely strongly, if not altogether, on *Garcia* v. *King* (Tex. Sup.), 164 S. W. (2), 509, to sustain the proposition that a determinable fee in minerals may be held to have automatically terminated if at the expiration of the primary term there was an absence of production in commercial quantity, by reading into the lease agreement such an implied limitation upon the duration of the grant where, as here, it was provided that the rights of the lessee would endure for the fixed term and as long thereafter as oil or gas should be "produced."

However, the effect of that decision must be determined in the light of certain controlling facts present here and absent there, as follows:

1. The phrase "in paying quantities" was not there used, as here, in relation to another obligation of the lessee, to which no condition of forfeiture was

attached;

2. There were no wells on the property the title to which passed to the lessee under the grant, with specific provision, as here, for continuation of the lessee's estate for the period of the primary term and as long thereafter as oil or gas should be produced from said existing wells and those to be drilled. In fact, there was no requirement to drill at all, the Garcia-King lease being the usual commercial type, with rentals fully paid for the fixed term;

3. There was no provision, as here, for participation by lessor in the cost of transporting and marketing oil and gas;

4. There was no inhibition in the contract, as here, against removal by the lessee of equipment, fixtures and casing except from an exhausted or dry well, evidenced by the finding of the court that the money for the exploration (a deep test) was realized by sale of the casings and other equipment from the shallow wells; and

5. Garcia v. King does not hold that the parties to a contract may not by apt language condition the duration of an estate as they please; or if it can be said that the Garcia-King case does purport to deny such right, it would be an unconstitutional invasion of the right of contract. However, evidencing that the court did not intend to announce any such obviously untenable doctrine is the following language from the opinion (512):

"It should be noted that we are here dealing

with a situation in which, under normal conditions, all of the producing wells on the lease in question *at the expiration of the primary period* were not producing enough oil or gas to pay a profit over and above the cost of operating the wells. In order to understand and properly interpret the language used by the parties *we must consider the objects and purposes intended to be accomplished by them in entering into the contract.* The object of the contract was to secure development of the property for the mutual benefit of the parties. It was contemplated that this would be done *during the primary period of the contract. . .*"

Here, the idea that any further development would be done, in a limitation sense, during and not after the fixed term is expressly negatived by the provision that the estate of the lessee would continue as long as oil or gas should be produced either from the existing wells or those which might be drilled in the future, because in December, 1920, the parties obviously had no way of knowing how much time would be required to develop a sufficient volume and quality of gas to attract a pipe line purchaser to the area.

And it may be noted how meticulously careful the Court was to confine application of the implied condition to the status of the lease at the end of the primary term. It cannot reasonably be inferred from the decision that if the Garcia-King lease had been commercially productive of oil or gas *at the end of the fixed period*, or if the status of its production at that time were not shown, the estate of the lessee, including his wells, equipment and casing, could be forfeited to a remote grantee of the lessor because

at the time of the later inquiry the production due to natural decline was not in paying quantities in the technical sense.

Such inference cannot be indulged, because Chief Justice Alexander, who wrote the opinion in Garcia v. King, was the author of the decision of the Supreme Court in *Watson* v. *Rochmill*, 155 S. W. (2) 783, where it was said in relation to conditions post-dating expiration of the fixed term of a lease:

> "The demoralized condition of the oil market and the low gravity in no wise prevented the operation of the well by the lessee *for whatever oil it would produce.* These conditions may have rendered it *unprofitable* to operate the well, but were not contracted against and consequently they did not prevent a lapsation of the lease . . . Under the facts of this case we hold that there was such a *cessation of production* as to terminate the lease as a matter of law."

In the Watson-Rochmill lease it was provided that it should remain in force for a term of three years from May 25, 1925, and as long thereafter as oil or gas, or either, was produced from the land by the lessee. A well was brought in on the lease in 1925, which produced oil until May 21, 1932. The oil was of low gravity. The well produced about one barrel of oil to ten barrels of salt water. No oil whatsoever was produced from May 21, 1932, to January, 1935. In response to the lessee's plea of estoppel, the court said further: "It appears, however, that the lease in question terminated by its own terms *automatically* upon *cessation* of production *after* the expiration of the primary term."

The proposition that to justify a forfeiture therefor absence of commercial production must be shown to have existed at the *end* of the primary term finds support in the further finding by Judge Alexander in the Garcia-King case that due to later development the lease was productive of oil in paying quantities when the case was tried. However, it was held that this would not avail the lessee because his estate had ceased to exist when the term ended and there was *then* absent production of oil or gas in paying quantities.

The vital importance of the question is emphasized by the court's extreme care to thus limit the effect of the decision, in evident recognition of the fact that if the estate of a lessee might be forfeited under conditions where the lease in question was producing oil or gas in paying quantities at the end of the primary term, although, due to the natural and inescapable decline in production throughout later years, it had ceased to so produce in the technical sense, many stripper leases in Texas would be placed in grave jeopardy, as the issue then would turn upon the factual determination by court or jury of their productive status at some time indefinable with exactitude subsequent to the ending of the fixed period, thus subjecting that type of lease to recurring attack, because a finding that the lease was once commercially productive would not be judicially conclusive of its status in that respect at a later date in consequence of a substantial lessening of the output, with the probable result that, despite governmental subsidies given in an effort to keep that type of lease on production in the face of constantly rising operating costs and inescapable decreasing revenues, the owners would face the additional handi-

cap of ruinous uncertainty and doubt respecting the title status of oil or gas offered for market, a condition which would invite widespread litigation and possible eventual disappearance of that type of essential activity from the American oil and gas scene.

The right to forfeit a vested estate in minerals should rest upon a surer foundation than this (*Decker* v. *Kirlicks*, Tex. Sup., supra, 216 S. W. 385). The court should in each case be so situated, from clear and certain proof offered by the complainant, that the specific condition of the contract for breach of which forfeiture is claimed could be pointed out, and the precise time of its occurrence noted. No lessee would have reasonable cause for complaint if at the instance of his lessor the issue of the commercial productivity of the lease at the end of the fixed period were submitted to court or jury, because if the issue should be decided adversely he could remove his equipment and casing and seek pastures anew.

But if, as here, the issue is precipitated by a remote grantee of the original lessor, some seventeen years after expiration of the primary term (R 15), with obvious uncertainty in the mind of the complainant as to just when the forfeiture occurred (R 19), and even more confusion on the part of the trial court after hearing the evidence as to when the estate of the lessee automatically terminated (R 182, 184); and under conditions where it is practically conceded by the new banking ownership that respondent, its creature, was commanded to seek forfeiture of petitioner's leasehold estate and oil and gas wells to facilitate the bank in the recoupment of its investment of $95,000.00, the lot of such

a stripper lease operator is indeed a hard one. Certainly there is nothing in the situation to appeal to the heart and conscience of the chancellor.

The trial court saw fit to find (R 180, para. 9) that petitioner's reason for attempting to hold this and other leases in the vicinity was the hope that it might share in the potentially large speculative values induced by the belief that the properties were underlain by deep production (Please see respondent's abandoned complaint, at page 7 of the record, paragraph 8, which furnishes a clear insight into the motivating purpose of this litigation). Aside from the fact that this belated and unrealized hope can have little bearing upon the construction of a written contract entered into some twenty-five years ago by the respective predecessors of the parties before the court (and evidently not shared by them, as the depth called for in the first test was only 1200 feet), the buoying hope of the wildcatter that some day he will come into his own should not be too severely condemned, because upon such intangibles as faith and hope and courage great institutions have largely been founded. Respondent does not say in its said abandoned complaint how long the premises have been "known to be underlain, at a depth of approximately 3600 feet, by a large potential oil and gas reserve, which production, if drilled and developed, would be of great value and would afford complainant a large income out of its royalty ownership, but which deep reserve the defendant has never tested, drilled or developed during the approximately twenty-two years which have elapsed since the date of the lease in question."

Surely, this assumed knowledge of the existence of a large potential oil and gas reserve could not

have been the prompting influence which caused petitioner and its predecessors to drill some fifty oil and gas wells, the latter manifestly with the hope and purpose of attracting a pipe line outlet for the gas. True, they took a chance, but they were engaged in a constructive enterprise, one which carried with it not only a hope of profit to themselves but which would benefit the entire community, and it occurs to petitioner that it comes with ill grace from the banking institution, for the sake of enhanced profits, to take action looking to the forfeiture of petitioner's estate and rights under conditions where if the latter and its predecessors had been derelict in further development, there was available to respondent the plain, adequate remedy of an action for damages, or for specific performance, requiring the drilling of a stated number of additional wells within a specified time, failing which the undeveloped portion of the lease would be cancelled. And in this latter connection, it may be noted that petitioner in 1940 obtained permits from the Texas Railroad Commission for the drilling of fifteen shallow wells on the premises in question (R 87), had completed six of said oil wells and was engaged in drilling a seventh when, because of order M-68, issued under the authority of the government, which restricted the drilling of oil wells to 40 acre tracts and gas wells to 640 acre tracts (petitioner's Exhibit 1, at page 40 of the Exhibit Appendix), further drilling was suspended.

VIII.

THE EVIDENCE.

Pertinent to Second Assignment.

As heretofore noted, the duration term of the lease was as follows:

> ". . . said lease to continue for the term of five years from this date and as long thereafter as oil *or* gas is produced from said leased premises by the lessee, its successors or assigns, as hereinafter provided, either from the existing wells upon said premises or future wells to be drilled thereon. . ."

Respondent, no doubt inadvertantly, misquoted the above term clause in its trial pleading causing it to read, as quoted, "oil *and* gas," instead of "oil *or* gas" (R. 19).

In its trial complaint respondent alleged: "During such period of more than five years the defendant has operated said lease at a recurring and continuing net loss, such that for more than five years said lease has failed to produce oil and gas, or either of them, in paying and commercial quantities" (R 18-20).

Throughout his Findings of Fact and Conclusions of Law, the trial judge treated conjunctively this particular issue, either by reference to "oil and gas" or to 'production", without distinction between the two (Findings, paras. 2, 7, 8, and 11, R 179-180; Conclusions, para. 1, R 182).

The witness LESLIE, called by respondent, tes-

tified in part as follows (R 56-57):

"Q. Compare, if you will, your operating costs of your oil wells as compared with your gas wells.

"A. Oh the gas it is not very much.

"Q. You don't have to pull those wells?

"A. No, sir.

"Q. You don't have any pumping equipment?

"A. No, sir; just maintenance of lines, a few odds and ends.

"Q. Relatively the cost of operating one of your oil wells is a great deal more than operating one of your gas wells?

"A. A little bit.

"Q. Relatively isn't it a great deal?

"A. Yes, sir.

"Q. In proportion it would be a great deal?

"A. That's right."

The gross receipts from the sale of gas from all of petitioner's leases for the years 1934 through 1943 and the first quarter of 1944 aggregated $27,718.35, with a net of $23,725.38, after deduction of royalties (Petitioner's Ex. "A", pp. 1-13). The gross sales of gas for the same period from the lease

in question amounted to $5245.52, and the net after payment of royalty to $4498.68 (Petitioner's Ex. "C", p. 4).

The witness Bussa, called by respondent, testified in part as follows:

"Q. Will you take that statement from the Comptroller and look through the monthly runs from the Hamilton-Swain lease from the time it begins in January, 1941, down to the present time?

"A. Would that be twelve wells all the time?

"Q. That is what the record shows, I believe, twelve wells more or less. Will you look through the monthly production over that period of time and advise us, Mr. Bussa, whether in your opinion, in view of your observation and experience in operating costs and conditions, wells making that amount of *production* from *twelve* wells during that period of time could be or have been operated at a profit?

"A. I don't believe it could (R. 73).

"Q. Mr. Bussa, may I ask a few more questions please, sir? If you had one pumper out there operating seven leases you would have less payroll than if you had seven; that is true isn't it?

"A. Yes, sir.

"Q. And that I understand to have been what you testified to?

"A. That was my idea.

. . . . . .

"Q. Assuming that this one man operates all *forty-nine* of these wells and all seven of these leases, remarkable as it may be, assuming it to be, nevertheless, please, sir, tell me whether still, in your opinion, Gas Ridge could operate those forty-nine wells even with one pumper profitably?

MR. BARTELT: That is objected to because it does not take into consideration the amount produced on the various leases and also the gas produced on the Hamilton-Swain.

MR. MILLER: By the assumption I mean to include all of the oil wells and all of the gas wells.

MR. BARTELT: If your honor please, there is no evidence before him what the gas production is on the Hamilton-Swain.

THE COURT: I will permit the testimony, he being or testifying as an expert.

"A. From the amount of the *oil runs* before me yesterday I would say it could not be operated profitably (R. 80-81).

"Q. Mr. Bussa, will you give us your estimate, please, of the relative cost of operating an oil well out there in this field as compared with a gas well?

MR. BARTELT: That is objected to. No testimony here shows that he has ever drilled a gas well or operated a gas well.

THE COURT: I think it is a proper question.

"A. Well, *it is an assumption on my part,*

what experience I have had with gas and oil. I would say it costs about three times as much to operate an oil well as a gas well."

"Q. Would you say not less than three times as much?

"A. Yes (R. 83).

The witness WALKER, an accountant, called by respondent, testified in part substantially as follows:

That he had made computations based on reports filed with the Railroad Commission by petitioner showing all of its oil runs from all of its leases, a similar statement showing the production in thousands of cubic feet from all of the gas leases, from January 1, 1941, through March, 1944, and copies of petitioner's income tax returns to the state of Wisconsin for the years 1934 through 1943, inclusive, one such computation on the basis of comparative income from each lease and the other on a comparative per-well basis, the latter upon the assumption that it costs three times as much to operate an oil well as it does to operate a gas well, the computations being made for the years 1941, 1942, and 1943 (R 152), with the result there was a wide variance in the claimed loss from *operations* on the *lease* here involved, dependent upon which method was used (R. 154-155).

The following circumstances are worthy of note in connection with the testimony of this witness: his conclusions are based upon the arbitrary assumption that it costs only three times as much to

operate an oil well as it does a gas well, whereas respondent's witness LESLIE, who actually operated the leases, testified that the comparative cost of operating a gas well was very little; WALKER'S figures do not purport to comprehend respondent's proportionate part of the cost of transporting and marketing the oil (hauling charges) or the gas (installing and maintaining the gathering system for delivery of the gas to the purchaser's meters); WALKER'S figures do not distinguish between oil production and gas production, but are based upon the *lease* as a unit; WALKER'S computations are based upon the *total* deductions claimed by petitioner in its Wisconsin income tax returns, without analysis thereof, or any of them, to show which of said deductions, if any, could properly be classified as operating costs, as defined in the Garcia-King case (164 S. W. (2) 509), where the court said:

> "In defining the term 'paying quantities,' the Court (in Parks v. Sinai Oil (& Gas) Co., 83 Okl. 295, 201 P. 517) said: 'It has been generally held that 'paying quantities,' when used in this connection, means paying quantities to the lessee. If a *well* pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, *and the enterprise as a whole may prove unprofitable.* Ordinarily the phrase is to be construed with reference to the operator, and by his judgment when exercised in good faith" 511-512).

IX.

ARGUMENT.

Summary of the Argument Under Second Assignment.

In his dissenting opinion, Judge Sibley said (R 269 to 271):

"There is no fact finding that the six gas wells operate at a loss, and the evidence does not show it. The finding is that each of the twelve oil wells costs three times as much to operate as a gas well. It may be well be that the gas wells pay, and if so the lease is not at an end. Unless the lessor, who is the plaintiff, establishes that neither oil nor gas is produced in paying quantities, he is not entitled to cancel his lease. . . . By the terms of the lease it continues 'so long as oil or gas is produced', at a profit as amended by the Texas court. We ought to grant a rehearing, and unless it can be demonstrated from the record that there is a loss in producing the gas also, the judgment should be reversed."

The courts are as one on the proposition that the burden rests on the plaintiff to establish his com plaint by a fair preponderance of the evidence. This is particularly true where he seeks to acquire the vested rights of another through the disfavored remedy of forfeiture (Gulf Production Co. v. Cruse (Comm. App., opinion adopted by Tex. Sup.), 271 S. W. 886). The courts may not make a contract for the parties. It is enough that they have made certain terms, conditions on which their contract shall continue or terminate (Insurance Co. v. Coos

County, 14 Sup. Ct. 379, 151 U. S. 452, 38 Law Ed. 231), quoted in Burns v. American Nat. Ins. Co. (Comm. App., opinion adopted Tex. Sup.), 280 S. W. 762.

The intention of the parties to a contract is to be gathered from a consideration of the entire instrument, taken by its four corners. It is to be read, considered and construed as a whole, and all of its provisions must be looked to and construed together in order to ascertain its effect and meaning (10 Tex. Jur., Sec. 164, p. 282; United States Fidelity & Guaranty Co. v. Board of Commissioners, 76 C. C.A. 114, 118, 145 F. 144, 148; Reynolds et al v. McMan Oil & Gas Co., et al. (Comm. App., opinion adopted by Tex. Sup.), 11 S. W. 2nd, 778), citing Gilbreath v. States Oil Corp. (C.C.A.), 4 F. (2) 233 (writ refused by Supreme Court, 268 U. S. 705, 45 Sup. Ct. 639, 69 Law Ed. 1167), opinion on motion for rehearing, 14 S. W. (2) 819; Nelson v. Downtain, et al. (Comm. App., opinion adopted by Tex. Sup.) 265 S. W. 135).

The word "or" in its ordinary sense is disjunctive and alternative in its effect, and, unless there is some impelling reason apparent in the contract, it should be given its ordinary rather than a conjunctive meaning (Shell Petroleum Corp. v. Royal Petroleum Corp. (Tex. Sup), 137 S. W. (2) 753.

The record of the proceedings in the trial court demonstrates that: (a) respondent predicated its cause of action on the proposition that the lease as a whole, without distinction between oil and gas, was operated unprofitably; (b) respondent's evidence was addressed to its status in that respect

as an entirety, save for the witness LESLIE, called by respondent, who testified unequivocally and without factual contradiction or question from any source, that the cost of operating a gas well in relation to that of an oil well was very little; and (c) that the trial court's findings and his conclusions therefrom were based specifically upon the profit status of the "lease" respecting its "production", again without distinction between oil and gas.

Indicative of the trial court's possible misapprehension of the actual terms of the contract when the findings and conclusions were made and filed are the following circumstances: misquotation by respondent in its trial complaint of the language of the duration clause, whereby it was made to read conjunctively rather than alternatively (R 19), followed by restriction of respondent's case to the profit status of the lease as a whole, without purport of distinction between oil and gas; the allegation that the lease was not productive of oil and gas, or either, in paying and commercial quantities; and the colloquy between the court and counsel shown at page 142 of the record, in the course of which the court remarked: " 'Operating cost' isn't the *term* that is *used* in the lease. 'Produced in paying quantities' is the *term*."

Judge Sibley frankly states that the misquotation by the trial court of the duration clause of the lease (R 177) was overlooked by the Circuit Court. The trial was concluded May 17, 1944. On September 15, 1944, petitioner's motion to reopen the case to permit inclusion in the record of certain O. P. A.

orders relating to subsidies for stripper wells and other affidavit data was overruled (Circuit Court opinion, p. 1, para. 4). Judgment in the lower court was entered October 4, 1944 (R 186).

Thus it will be observed that a period of nearly five months elapsed between the conclusion of the trial and the entry of the judgment. Memorandum opinion of the trial court was delivered September 26, 1944, with directions for preparation and submission of the formal judgment (R 176).

However, irrespective of how the obvious misconception by the trial court of the gravamen of respondent's asserted cause of action and the correct verbiage of the duration clause of the lease came about, the result is that the Circuit Court of Appeals, with due apprizal of the record facts, nevertheless sanctioned the action of the trial court in decreeing forfeiture of petitioner's leasehold estate and wells under conditions where it is manifest that the trial court's action was based upon a misapprehension of the true purport of the contract involved in a vital and controlling particular.

It should not be assumed that if the trial court's attention had been been called to the fact that, assuming applicability of the implied condition "in paying quantities", respondent none the less would have prevailed in its effort to cancel the lease without even an attempt to sustain the burden of establishing that gas was not being produced within the meaning of such implication, particularly in view of the fact that the only witness who professed to have any first-hand knowledge of the gas operations, called and therefore vouched for by respondent, tes-

tified unequivocally that the operating expense incident to producing the gas was relatively very little (R 56-57).

It is most respectfully submitted, therefore, that it became the duty of the Circuit Court to reverse the decree of the lower court in the circumstances shown by the record; and that in declining to do so the Circuit Court so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower court, as to call for an exercise by the Supreme Court of its power of supervision.

X.

CONCLUSION.

The questions suggested by this record are of more moment to the community than would be the effect of their determination upon the individual fortunes of the parties. It might be of little concern, in a jurisdictional sense, that petitioner had been wrongfully deprived of its property. But when it is considered that the decision of the Circuit Court, if it is to become final, will serve as an authoritative precedent for determining the title status of possibly many other such similarly situated stripper leases in Texas, or even in other jurisdictions, it would appear that the issues are of such general importance as to bespeak their determination by the Supreme Court.

The principles clearly established by the decisions of the Texas Supreme Court in Waggoner Estate v. Sigler Oil Co., 19 S. W. (2), 27, and in Watson v.

Rochmill, 155 S. W. (2), 783, have in a very true sense become rules of property, in that probably few operators would undertake the testing and development of a lease in the face of the probability that when his production reached the stripper stage, although in profitable quantity when the primary term ended, he would be confronted with vexatious and expensive litigation over the factually uncertain issue of whether the lease had automatically terminated at some undefined time prior to the trial because of its alleged commercial unproductivity.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue in this cause to the United States Circuit Court of Appeals for the Fifth Circuit.

Arthur H Bartelt

ARTHUR H. BARTELT,
Attorney for Petitioner.
P. O. Box 190,
Austin, Texas.

Fagan Dickson

FAGAN DICKSON,
Of Counsel
Austin, Texas.

No. 6640 Oil and Gas Lease.

Hamilton Land & Development Co.

San Antonio Oil & Natural Gas Co.

AGREEMENT made and entered into the **7th** day of **December** 1920 by and between Hamilton Land and Development Company, a Texas corporation, hereinafter called lessor and San Antonio Oil & Natural Gas Company, a South Dakota corporation, hereinafter called lessee, WITNESSETH:

Said lessor for and in consideration of the sum of one dollar and other valuable considerations to it paid by the lessee the receipt of all of which is hereby acknowledged and of the covenants and agreements herein contained does grant, demise, lease and let unto said lessee, its successors or assigns, for the sole purpose of mining and operating for oil and gas and of laying pipe lines and of building thereon tanks, towers, stations and other structures, and doing all things necessary or convenient in connection with the production and storage, transportation, sale or other disposition of said oil or gas, or both, all of that certain tract of land situated in the county of Bexar, State of Texas and being 2070 acres more or less, more generally known as the Hamilton-Swain tract and being the same property described more particularly in the deed from the Duluth & Texas Oil Company, of Texas, to said Hamilton Land and Development Company herein referred to and made a part hereof for description including the existing wells and personal property on said premises, said lease to continue for the term of five years from this date and as long thereafter as oil or gas

is produced from said leased premises by the lessee, its successors or assigns, as hereinafter provided, either from the existing wells upon said premises or future wells to be drilled thereon, reserving the right to all of the surface of the land not deemed necessary, useful or convenient by lessee in connection with its operations hereunder.

In consideration of the premises the said lessee covenants and agrees:

To deliver to the credit of lessor, its successors or assigns, free of cost in the tanks or pipe lines to which lessee may connect its wells the equal one-sixth part of all oil and gas produced and saved from said leased premises or at its option lessor may provide at its own expense and risk receptacles at the well for its said one-sixth royalty.

In event lessor shall fail to provide storage facilities or receptacles as specified in this instrument, the lessee may sell and dispose of all oil and gas produced and shall account to lessor, out of the proceeds of such sales, for the royalty above specified after deducting lessor's proportionate share of transportation and marketing cost thereof.

The lessee agrees to commence actual drilling upon said property of an oil or gas well on or before two hundred twenty days from date hereof and to complete same with reasonable diligence and dispatch to a depth of not less than twelve hundred feet unless oil or gas **in paying quantities** be found or produced by lessee at a lesser depth and upon the completion of said well said lessee shall continue

the development of said property until said property has been reasonably developed.

Lessee shall have the right to use in drilling and development operations, free of cost, gas and water produced on said land (except water from the wells of lessor) including the right to use water from tanks now existing or which may hereafter be placed in said premises.

When requested by lessor, lessee shall bury all pipe lines below plow depth.

No well shall be drilled nearer than two hundred feet to the house or barn now on said premises without the written consent of lessor.

Lessee shall pay for all damages caused by its operations to growing crops on said land.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises from any exhausted or dry well or other operations including right to withdraw or remove casings.

The lessee shall have the right to assign this lease in whole or in part and the development obligations hereinabove provided for shall be deemed to have been complied with whether reformed by lessee or any of its assigns.

No assignment of royalties shall be binding upon the lessee until the latter shall have been furnished with certified copies of such assignment.

Executed in duplicate this the **7th** day of **Dec.** 1920.

HAMILTON LAND & DEVELOPMENT CO.

By V. E. Hamilton
(seal) President.

Attest:
W. H. Kennon
Secretary.

STATE OF TEXAS

: -ss-

COUNTY OF BEXAR

Before me the undersigned, a notary public within and for the County of Bexar, State of Texas on this day personally appeared V. E. Hamilton, president of the Hamilton Land and Development Company, and W. H. Kennon, secretary of said company, known to me to be the persons whose names are subscribed to the foregoing instrument and severally acknowledged to me that they executed the same for the purposes therein expressed and in the respective capacities therein stated as the act and deed of said Hamilton Land and Development Company.

Given under my hand and seal of office this **7th** day of **December** 1920.

(SEAL) Louise Wiemers

Notary Public, Bexar County, Texas.

Filed for record Dec. 9, 1920 at 2:48 o'clock P.M.
Recorded Dec. 13 1920 at 10:45 o'clock A.M.
Jack R. Burke, County Clerk, Bexar County, Texas.
By Chas. Grossman, Deputy.

- - : CERTIFICATE : - -

THE STATE OF TEXAS,
COUNTY OF BEXAR.

I, JACK R. BURKE, Clerk of the County Court in and for Bexar County, Texas, do hereby certify that the above and foregoing is a true and correct copy of an Oil and Gas Lease from Hamilton Land & Development Co .to San Antonio Oil & Natural Gas Co., as the same appears of record in Volume 619 on pages 470-572 of the Deed Records of Bexar County.

IN TESTIMONY WHEREOF, witness my hand and official seal, at office in the City of San Antonio, this the 24th day of November, A.D. 1923.

Jack R. Burke

Clerk, County Court, Bexar County, Texas.
By Garvin C. Legan

Deputy.

DEC 26 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 653

GAS RIDGE, INC., Petitioner,

versus

SUBURBAN AGRICULTURAL PROPERTIES, INC., Respondent.

MOTION TO DISMISS PETITION FOR CERTIORARI

and

REPLY TO PETITION FOR CERTIORARI.

KNOX MILLER,
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LUDOVIC PRINTING CO., SAN ANTONIO, TEXAS

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Supreme Court of the United States

No. 653

GAS RIDGE, INC., Petitioner,

versus

SUBURBAN AGRICULTURAL PROPERTIES, INC., Respondent.

MOTION TO DISMISS PETITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition for the writ of certiorari should be dismissed because the record filed in this honorable court does not include the original, or a printed or other copy, of a 77 page typewritten volume pre-

pared by the court reporter, entitled by him the "Exhibit Appendix", and comprised of substantially all the documentary evidence received at the trial including the lease itself. A duplicate original, filed copy of this "Exhibit Appendix" is herewith enclosed. The record as filed in this honorable court by petitioner without this "Exhibit Appendix" is incomplete, inadequate, and unintelligible, such that the material thus far filed by petitioner does not constitute the record in the case. The petition for rehearing was overruled by the honorable Circuit Court on September 13, 1945, more than three months now having elapsed since that date.

REPLY TO THE PETITION.

Subject to, and without waiving the foregoing motion to dismiss the petition, respondent replies thereto as follows:

1. **Reply to the First Assignment of Error. W. T. Waggoner Estate v. Sigler Oil Company,**[1] on which petitioner bases its first assignment, was decided by the Supreme Court of Texas June 28, 1929. **Garcia v. King**[2] was decided by the same

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1. 19 S. W. (2d) 27.
2. 164 S. W. (2d) 509.

court July 15, 1942. Petitioner takes the position that the State Supreme Court is in conflict with itself in these two decisions and that the Circuit Court erred in applying the rule announced in **Garcia v. King** in the case at bar. If, as petitioner says, Waggoner's case and Garcia's case are in conflict, the latter would control, and the Circuit Court would have been compelled to follow it.

But the two cases are not in conflict. There were two wells on Sigler's lease **producing oil in paying quantities.** Waggoner did not complain that Sigler's lease was not producing in paying quantities. He complained that **Sigler had not drilled enough wells.** The State Supreme Court in Waggoner's case decided that Sigler's lease, **including his two commercially productive wells,** would not be canceled for his failure to drill more wells. The court said Sigler's obligation to drill more wells was an implied **covenant,** not a **limitation or condition** on his title, and that for the breach of this covenant he would be liable in damages, but his commercially productive lease would not be canceled. **That would be a forfeiture.**

In Garcia's case **there was no paying production.** Garcia did not complain of King's failure to drill more wells. Garcia complained that King was trying to hold on to a lease which had expired under its own **limitations and conditions** because **it had ceased to produce in paying quantities.** The State Supreme

Court held, in Garcia's case,[3] that the language of the **term clause** of the lease, viz.: that the lease should remain alive for a certain number of years, and thereafter so long as oil or gas was produced, **was a limitation or condition upon the title to the leasehold estate.** A life estate expires by its own limitation when the life tenant dies. **There is no forfeiture from his heirs.** The **legal** estate comes to an end by virtue of its own terms and limitations, and so it is, said the State Supreme Court in Garcia's case, and said the Circuit Court in the case at bar, with an oil and gas lease. The lessee's **legal title** is determinable. When paying production ceases the legal estate dies by virtue of the limitation imposed upon it in the term clause when the lease was created.

Both the Waggoner case and the Garcia case are sound, and both are the law in Texas. The facts of the case at bar are identical with the facts in Garcia's case, but wholly unrelated to those in Waggoner's case. The Circuit Court correctly applied the rule established in Garcia v. King.

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3. To the same effect are Watson v. Rochmill, (Tex. Sup. Ct.), 155 S. W. (2d) 783; Freeman v. Magnolia Petroleum Company, (Tex. Sup. Ct.), 171 S. W. (2d) 339; Kyle v. Wadley, 24 F. Sup. 884; Benedum-Trees Oil Company v. Davis, (C. C. A.), 107 F. (2d) 981; United States v. Brown, (D. C.) 15 F. (2d) 565; Continental Oil Company v. Osage Oil & Refining Company, (C. C. A.), 69 F. (2d) 19; Hutchinson v. McCue, 101 F. (2d) 111, cert. den., 60 S. Ct. 75; 308 U. S. 564; 84 L. Ed. 473; Live Oak Basin Oil Association v. Reagan, (Tex. Civ. App.), 289 S. W. 1052; No Writ; Stein v. Blackwell, (Tex. Civ. App.), 47 S. W. (2d) 490, No Writ; Duff v. DuBose, (Tex. Com. App.), 27 S. W. (2d) 122; Stanolind Oil & Gas Company v. Barnhill, (Tex. Civ. App.), 107 S. W. (2d) 746, writ ref'd.

2. **Reply to the Second Assignment of Error.** Petitioner's second assignment is based upon Judge Sibley's dissent in which he says:

> "There is no fact finding that the six gas wells operate at a loss, and the evidence does not show it." (R. 270).

The dissent, and the above quoted statement from it, arose from an oversight. The learned dissenting judge examined a part of the record, but not all of it. Specifically, he read the findings but not the judgment. Had he looked at the judgment, he would have found, in clear and explicit language, the identical finding which he says is missing. We quote from the trial court's judgment, (R. 184):

> "The oil, gas, and mineral lease which is the subject matter of this cause, * * * permanently ceased to produce **either oil or gas,** or both oil and gas, in paying and commercial quantities more than five years prior to this date * * *."

The record is replete with proof which completed this express finding by the trial court that this lease did not produce **gas** in paying quantities. For present purposes we cite only petitioner's verified admissions appearing at pages 22 to 38 of the reporter's typewritten "Exhibit Appendix" which admissions are authenticated and explained in the testimony appearing at pages 137 to 141 of the printed record. These accounts, prepared, sworn

to, and filed by petitioner's officers, show that during the years 1934, 1935, and 1936, petitioner **produced nothing but gas—no oil whatever.** During those three years in which it produced gas only, petitioner, by its own admissions, sustained losses in its current operations **from gas production only,** of $1010.83 in 1934, $1090.25 in 1935, and $413.32 in 1936.

Not only so, but the record shows that petitioner employed one field man only to attend to all its production. (R. pp. 50, 71, and 77). These same accounts, prepared by petitioner, show that the modest salary paid this one field employee, William Leslie, continuously exceeded petitioner's entire income from all its gas production. For example:

"Exhibit Appendix" Page	Year	Leslie's Salary	Total Gas Income
38	1943	$2070.00	$1222.92
36	1942	$1920.00	$ 432.78
34	1941	$1620.00	$1182.76

No notice is taken here of all petitioner's other current operating expenses, such as taxes, bookkeeping and office overhead, repairs, replacements, depreciation, automobile expense, telephone, telegraph, postage, attorney's fees, etc., etc., etc. The single item of the small salary paid its lone field man itself caused "the six gas wells (to) operate at a loss."

Respondent submits respectfully that both assignments are without merit and that the honorable Supreme Court is without jurisdiction.

A copy hereof has been mailed to Arthur H. Bartelt, attorney for petitioner, whose address is Post Office Box 190, Austin, Texas.

.....

KNOX MILLER,
Alamo National Building,
San Antonio 5, Texas,
Attorney for the Respondent.

.....

LEO BREWER,
Alamo National Building,
San Antonio 5, Texas,
Of Counsel for Respondent.

(17)

Office - Supreme Court, U. S.
FILED
JAN 7 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 653

GAS RIDGE, INC.,
Petitioner

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent

ANSWER TO MOTION TO DISMISS PETITION FOR CERTIORARI

ARTHUR H. BARTELT
Attorney for Petitioner
Austin, Texas
FAGAN DICKSON
Of Counsel, Austin, Texas

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IN THE

Supreme Court of the United States

October Term, 1945

No. 653

GAS RIDGE, INC.,
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v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent

ANSWER TO MOTION TO DISMISS PETITION FOR CERTIORARI

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, answering respondent's motion to dismiss, says:

The Honorable W. A. Keeling, judge of the District Court, upon a written stipulation entered into by and between the parties to this action by their

respective attorneys, Knox Miller for plaintiff, and Arthur H. Barnett for defendant, ordered that:

"The foregoing stipulation with references to sending up the original exhibits comprising the volume which the reporter has entitled 'Exhibit Appendix', and Exhibits A, B, and C referred to in the defendant's motion to re-open the case, is approved, and it is ordered that said volume entitled 'Exhibit Appendix, and said Exhibits A, B, C attached to defendant's motion to re-open the case, *shall not be copied* or *printed*, but the originals shall be transmitted with the record in the case to the appellate court. Filed Oct. 16 1944. W. A. Keeling, Presiding Judge." Tr. of Record 190 & 191.

Accordingly "Exhibit Appendix" and Exhibits A, B, and C referred to in defendant's motion to re-open the case were transmitted with the record in the case to the clerk of the Circuit Court of Appeals 5th Circuit.

In accordance with Rule 38, paragraph 7 of this court, the clerk of the Circuit Court of Appeals prepared the record which was to accompany this application for certiorari by preparing one original volume of the record and certified the same as being a true record in the case. Tr. R. p. 268.

This original record so certified to by the clerk, together with ten copies of each of the following: printed transcript of the record in the district court, petitioners Motion for Rehearing, Supplemental Mo-

tion for Rehearing and respondent's Reply to Motion for Rehearing were sent to Arthur H. Bartelt, attorney for appellant, at Austin, Texas. The latter in turn on the 5th day of December, 1945, together with petitioner's Motion for Certiorari and Supporting Brief, sent all of these records to the clerk of the Supreme Court of the United States by express except that three originals were sent to the clerk of the Supreme Court of the United States by airmail and special delivery.

On the 5th day of December, petitioner's attorney mailed to respondent's attorney, Knox Miller, Alamo National Bank Building, San Antonio, Texas, a copy of petitioner's petition for certiorari and supporting brief.

On December 12, 1945, petitioner's attorney wrote to Knox Miller, the attorney for respondent, "The Exhibit Appendix and other originals are not up. However, under Supreme Court Rule (10) 4, these can go up by you and me signing a stipulation to that effect and then have one of the Circuit Court judges sign an order requiring the clerk to ship them to the clerk of the Supreme Court. In a few days I will draw such stipulation and order and sign it and mail it to you."

Mr. Miller never answered this letter.

On December 19, 1945, petitioner's attorney received a copy of the letter of Knox Miller mailed to Charles Elmore Cropley, Clerk of this Court, as fol-

lows: "On behalf of the respondent in the above cause we are sending you under separate cover, by express, forty copies, one of which is signed, of the respondent's motion to dismiss the petition and its reply to the petition. *We herewith enclose a duplicate original*, filed copy of a seventy-seven page typewritten volume entitled by the court reporter, "Exhibit Appendix", which is comprised of the documentary evidence received at the trial, and the mission of which from the record as filed by the petitioner is the basis of the respondent's motion to dismiss the petition."

On Saturday, the 22nd of December, 1945, petitioner's attorney, while in San Antonio, went to the law office of respondent's attorney, Knox Miller, in the Alamo National Bank Building, San Antonio, to present to him a stipulation to be signed by respondent's and petitioner's attorney which read as follows:

> "It is hereby stipulated by and between the above named parties by their respective attorneys, subject to the approval of this Court, (the title of this stipulation being in the Circuit Court of Appeals where the records still are) that Exhibit Appendix containing plaintiff's exhibits 1 to 22 and defendant's exhibits A, B, and C (Tr. R. 170) attached to (referred to) in the motion to re-open the case, which were ordered by the Honorable W. A. Keeling, the Judge of the District Court, all of which are primarily production and expense figures 'not to be copied or printed, but the originals shall be transmitted with the record in the case to the

Appellate Court', (Tr. R. 190) be sent to the Supreme Court of the United States for its inspection in the matter of Gas Ridge, Inc's Petition for Certiorari now pending before the Supreme Court of the United States and that an order to that effect be issued by this Court directing that the clerk of this Court (Circuit Court) transmit all of the foregoing listed Exhibits to the clerk of the Supreme Court of the United States under such conditions as this Court shall state."

However, when petitioner's attorney arrived at the office of Attorney Miller, he found a note on the door stating that the office was closed until the next Monday, December 24, 1945. When petitioner's attorney returned to Austin, he mailed the stipulation which he had signed to Knox Miller. On Monday, December 24, petitioner's attorney telephoned Knox Miller by long distance and requested the latter to sign the stipulation. But Mr. Miller said he had not yet received the stipulation.

On Wednesday, December 26, petitioner's attorney again telephoned Knox Miller, when the latter said that he would not sign the stipulation which he had received that morning. In the same telephone conversation Knox Miller said he had received a copy of the record as prepared by the clerk of this Court and which petitioner's attorney had mailed to him on December 25, 1945.

Petitioner is willing to leave the carbon copy of "Exhibit Appendix" for the use of this Court in lieu

of the one now in the Circuit Court of Appeals, but subject to two conditions.

(a) Judge Sibley, in his dissenting opinion, says:

> "The motion for rehearing stresses the point that the lease continues so long as oil *or* gas is produced, the lease having been*misquoted* by *the trial court*, and *the difference having been overlooked by us.* I think the point is *well taken.*"

Knox Miller, in his pleadings, misquotes the term clause in the lease.

First Amended Complaint:

> (1) "for the term of five years from this date, and as long thereafter as oil *and* gas is produced from said leased premises by the lessee, its successors or assigns" (Tr. 5)
>
> (2) ". . . . said land has not produced oil *and* gas in paying or commercial quantities". (Tr. R. 8)
>
> (3) Again on page eight of the Transcript of Record and this time from the lease "five years from this date (December 7, 1920), and as long thereafter as oil and gas is produced from said leased premises."

Second Amended Complaint:

> (4) Quoting from lease ". . . . and as long thereafter as oil *and* gas is produced from said lease premises by lessee." (Tr. R. 19)

In Appellant's Supplemental Petition for Rehearing, page 8 and page 236 of the record, petitioner said:

> "The Court's attention is again called to the fact that the language of the lease is 'as long thereafter as oil *OR* gas is produced' and not 'as long as oil *AND* gas is produced.'
>
> * * * *
>
> Then throughout the Findings of Fact and Conclusions of Law, the findings of the Court (District) both as to fact and law speak of production in the aggregate, as does appellee throughout its brief, . . "

RESPONDENT MAKES NO ATTEMPT TO EXPLAIN ITS MISQUOTING OF THE TERM CLAUSE IN THE LEASE.

Although attorney Miller's attention has been called several times in petitioner's briefs as to his continually misquoting the term clause of the lease, whose plain, unambiguous language, which the courts are bound to follow, among other equally cogent issues, is a deciding point in this case all by itself, yet Attorney Miller has not at any time made any attempt to explain how it happened that the lease was misquoted.

Not even in the respondent's printed "Reply to Petition for Certiorari" just filed with this Court is

any explanation to be found. Was this just an oversight and if so, why has it happened several times and yet no explanation? Because of this silence of Respondent, petitioner says it is entitled to know if the copy of the lease sent to this Court, which is plaintiff's Exhibit "1" in "Exhibit Appendix, whether in its term clause, contains the word "or" or "and" between the two words "oil" and "gas". Petitioner is making inquiry from the clerk as to the exact wording contained in the copy of the lease as contained in Exhibit Appendix, Plaintiff's Exhibit 1.

(b) By stipulation of parties and Order of the District Judge, not only Exhibit Appendix was sent up to the Circuit Court of Appeals, but also defendant's Exhibits A, B, and C. These exhibits contained the production figures and costs of operation and computations thereon of all the leases in the field—all leases being operated on a one unit plan and also as to production figures and operating costs as to production on the Hamilton-Swain lease.

Respondent has sent to this Court a copy of Exhibit Appendix but not of defendant's Exhibit A, B, and C. Therefore, defendant is entitled to have its Exhibits A, B, and C transferred from the Circuit Court of Appeals to this Court for inspection.

Petitioner will file a motion in the Circuit Court of Appeals praying that it send both Exhibit Appendix and defendant's Exhibits A, B, and C to the Supreme Court of the United States. In support of said motion there will be filed a printed copy of this motion.

RESPONDENT'S MOTION TO DISMISS DOES NOT SET FORTH ANY JURISDICTIONAL ISSUE AND THEREFORE IT MUST BE DISMISSED.

> "No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant writs of certiorari may be included in briefs in opposition to petition therefor." (Rule 7 (3) of the Supreme Court of the United States.

Wherefore petitioner prays that respondent's motion to dismiss petitioner's petition for certiorari be denied.

ARTHUR H. BARTELT
Attorney for Petitioner
Austin, Texas

FAGAN DICKSON
Of Counsel, Austin, Texas

Office - Supreme Court, U. S.
FILED
JAN 14 1956
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

NO. 653

GAS RIDGE, INC.,
Petitioner,

SUBURBA
v.

RICULTURAL PROPERTIES, INC.,
Respondent.

PETITIO

S BRIEF TO RESPONDENT'S REPLY

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IN THE

Supreme Court of the United States

NO. 653

GAS RIDGE, INC.,
Petitioner,

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent.

PETITIONER'S BRIEF TO RESPONDENT'S REPLY

To the Honorable Supreme Court of the United States:

I

First Assignment of Error

Respondent either misinterprets or misrepresents petitioner's position in relation to this question. The latter has not asserted that *W. T. Waggoner Estate* v. *Sigler Oil Company* (19 S. W. (2) 27 and *Garcia*

v. *King* (164 S. W. (2) 509) are in conflict. As conceded by respondent, *Waggoner* v. *Sigler* dealt with a situation where there was commercial production *at the end of the primary term*, whereas in *Garcia* v. *King* such quantum of production was lacking *when the fixed term ended.*

In the case at bar respondent neither denies nor questions the existence of paying oil or gas when the primary term ended on December 7, 1925. In fact, the record affirmatively indicates that the leased premises were commercially productive of oil and gas when the fixed period ended, in that by instrument dated May 24, 1924, the lessor *reduced* the royalties specified in the original lease (R 35), and agreed that, as thus modified, it should *continue* in full force and effect (petitioner's Ex. 17, pp. 61-62 of the Exhibit Appendix).

It is apparent, therefore, that the controlling factual difference between *Garcia* v. *King* on the one hand and the case at bar and *Waggoner* v. *Sigler* on the other is that in the former there was absent commercial production at the *end* of the primary term, wherefore, the necessity therefor having been implied, the estate *automatically* ceased to exist, whereas in *Waggoner* v. *Sigler* such term limitation upon the duration of the estate having been met, there was no other condition in the contract (as there is none in agreement here involved) upon which could be predicated an *automatic* ending of the lessee's estate. The only difference in the situation here in this respect and that obtaining in *Waggoner* v. *Sig-*

ler is that, assuming applicability of the term "paying quantities," neither by allegation nor proof does respondent furnish the basis for a determination that petitioner's estate automatically ceased to exist when the fixed period ended.

Respondent's confusion appears to result from its failure to distinguish between a limitation upon the duration of an estate and breach of a condition subsequent entitling the grantor to reentry. In the former no judicial latitude is permitted. When the period fixed for its duration has elapsed, or the precise condition limiting its life has occurred, the estate simply ceases to exist, whereas in a situation embodying the alleged breach of an express or implied condition the existence of which is of necessity factually uncertain, it will be treated as the violation of a condition subsequent in the nature of a covenant which, save in extraordinary circumstances, will not support a forfeiture.

This distinction is made unmistakably clear in *Waggoner* v. *Sigler*, where the court, following discussion of the difference in this respect between a "drill or pay" clause and an "unless" limitation, says further:

> "The words of the second and third clauses of limitation above mentioned, not only fail to make the duration of the granted estate depend upon *the degree of diligence* (the court's emphasis) in the continued exploration, development and *production* (emphasis added) of oil and gas on the land, after their discovery, but

> such words expressly negative the termination of the lessee's interests as long as either oil or gas was actually being produced from the land. The express provision of the third clause is that the lease shall remain in force, i. e., shall *not* terminate, *as long as* (the court's emphasis) either oil or gas is produced from the land by the lessee. We are asked to say, by judicial interpretation, that the lease shall terminate *before* (the court's emphasis) the cessation of production of oil or gas from the land by the lessee, if, by reasonable diligence, more oil or gas could have been found, produced or marketed. A court should never override by implication the intention of parties expressed in a binding writing. Freeport Sulphur Co. v. American Sulphur Royalty Co. (Tex. Sup.), 6 S. W. (2) 1043" (p. 30).

When the principles announced with such clarity in the Waggoner-Sigler case are considered in the light of the later decision of the Texas Supreme Court in *Watson* v. *Rochmill*, 155 S. W. (2) 783 (by Judge Alexander, who wrote the opinion in *Garcia* v. *King*), where it was unequivocally held that the lessee could have maintained his estate by operating the well for whatever oil it would produce, although unprofitably, the conclusion appears to be inescapable that a lease such as that involved here cannot be forfeited *after* the expiration of the primary term *so long as* oil or gas is being *produced* and marketed, as expressly provided by its duration clause.

Wherefore, petitioner respectfully reiterates its position that *Garcia* v. *King*, upon which respond-

ent and the Circuit Court almost exclusively rely, goes no further than to hold that a lease such as that there involved will *automatically* terminate if at the end of its expressly defined duration term there is an absence of paying production of oil or gas; but that, even though it might be held that the decision was not thus limited in its legal effect, the condition of "paying quantities" there implied could not be so treated here because of several material differences in the two contracts, clearly evidencing in the case at bar that the parties intended to say exactly what they did say, i. e., that the estate of the lessee would continue so long as oil or gas might be *produced* from the leased premises, either from the existing wells or those drilled in the future.

And in this connection, an obvious contradiction in terms and legal effect may be noted in respondent's trial complaint, the trial court's findings and conclusions and in the judgment, wherein it is charged, found, concluded and adjudged that the lease *automatically* terminated at some unspecified time *more* than five years before the trial. This was as close as respondent and the trial court were willing to fix the occurrence of the event which as a matter of law had the effect of *automatically* putting an end to a vested estate in lands. If neither respondent nor the trial court was prepared to say with any degree of certainty when such event occurred, the conclusion would appear to necessarily follow that such a breach, assumed arguendo, should not be accorded the dignity of an express or implied limitation upon the duration of the grant, but should

be held, if properly implied, to be a mere covenant.

Respondent suggests the automatic termination of a life estate upon the death of the life tenant, as pertinently illustrative of a limitation upon the duration of the life estate excluding the idea of forfeiture from (to) the residuaries. But this is begging the question, because in the case at bar there was no such or any limitation upon the duration of the estate granted save to *produce* oil or gas from the premises. However, in relation to an estate upon condition, assume a different situation from that suggested by respondent, more relevant to the facts here, where an estate was granted, to continue so long as the grantee might adequately support and maintain the children of a marriage. Such a limitation would not support a contested forfeiture, because, as stated by Chief Justice Stayton in *Benavides* v. *Hunt* (Tex. Sup.), 15 S. W. 399, "the use of all economy" would be too uncertain to recognize as a condition on which a forfeiture might rest, as "it would vary as much as the opinions of witnesses might vary on a matter of fact about which no fixed rule determines compliance or noncompliance"; and that "The authority to forfeit estates vested can not exist by reason of the existence or nonexistence of a state of facts not clearly defined," sound principles of law which were reaffirmed in the later case of *Decker* v. *Kirlicks* (Tex. Sup.), 216 S. W. 386.

The necessity for certainty in cases of this nature

is emphasized not only by obvious confusion in the minds of respondent and the trial court as to when the event occurred which served to automatically end the estate, but by the indecisiveness of respondent's witnesses as to whether it occurred at all, particularly in relation to the gas, evidenced by wide discrepancies in the testimony of respondent's witnesses LESLIE and BUSSA, the former testifying unequivocally that it cost very little to operate the gas wells (R 55-56) and the latter, based upon pure assumption, that it cost about, or not less than, three times as much to operate an oil well as it does a gas well (R 83).

And it may be noted further *that no witness in this case testified to any definable expense attributable to the production and marketing of the gas.* It appears to be respondent's position that this Court will assume, as did the District and Circuit Courts, that some arbitrary, undefined proportion of the expense incident to operating the twelve oil wells on the lease in controversy should be allocated to the gas wells, with no surer foundation than the guess of BUSSA that the proportion of expense should be fixed on the basis of about three to one for the oil wells over the gas wells; and the accountant WALKER'S conclusions (R 152, 153 and 154) that certain computations made by him correctly reflected the profit and loss status of the lease in controversy for the years 1941, 1942 and 1943, because the Federal Government in certain circumstances would accept such estimates in determining depletion allowables, which is a far cry from the

definite proof required by all of the Texas decisions as a prerequisite to forfeiture of a vested estate.

II

Second Assignment of Error

Respondent's rather facetious dismissal of Judge Sibley's dissent is not justified by the record. The devastating portion of the Judge's observation is not so much that "there is no fact finding that the six gas wells operate at a loss," but the concluding statement "*and the evidence does not show it.*" It may be of little consequence whether the trial court's finding that neither oil nor gas was produced in commercial quantities appears in the findings as such, or in the formal judgment, although ordinarily in a case tried by the court the judgment must find support in the findings of fact and conclusions of law. However, this distinction may be dismissed as smacking of technicality, and it is not petitioner's position that it should prevail in this case save upon the basis of applicable principles of law addressed to the established or conceded facts. But when the Judge in his dissent says that the evidence does not show that the six gas wells were operated at a loss, he is indubitably correct, evidenced by the following:

(a) Respondent's witness LESLIE testified unequivocally that the expense attached to operating

the gas wells was of no consequence, "just maintenance of lines, a few odds and ends" (R 56);

(b) Respondent produced no other witness who even professed to have any actual knowledge of the expense incident to operating the six gas wells situated on the premises;

(c) It is not disputed that for many years the said wells have been connected and regularly delivering gas to an established pipe line (which alone should dispose of the question of the production of gas in commercial quantities); and

(d) Respondent produced no witness who testified to any ascertainable or definable expense attached to the production and marketing of the gas on the lease in question (thus leaving the forfeiture of a vested estate to rest upon conjecture and assumption).

Evidently recognizing the necessity for countering Judge Sibley's conclusion that the evidence was deficient in this respect, respondent has resorted to the obviously desperate expedient of attempting to show that in the years 1934, 1935 and 1936, when *petitioner* produced nothing but gas, losses were sustained in the amounts stated, presumably from operations on all of its leases. But the difficulty with respondent's position here is that the claimed loss (which is not shown by the evidence, as will be pointed out) *occurred before respondent acquired title to the property on July* 8, 1937 (R 16; respond-

ent's Exhibit 18, at page 63 of the Exhibit Appendix), and before its alter ego, the Alamo National Bank, acquired title June 19, 1937, by a conveyance made subject to the lease here involved (R 124; respondent's Exhibit 10, at page 20).

Thus are we confronted with the truly remarkable idea that the forfeiture of a vested estate may be sustained because of the existence of alleged conditions occurring prior to the acquisition of title by the complainant whose mentor accepted the conveyance subject to the terms and conditions of the very lease which its "vehicle" later sought to destroy. Turning again to *W. T. Waggoner Estate* v. *Sigler Oil Co.* (19 S. W. (2) 27) and the many authorities there cited, the principle of law is too well settled to admit of cavil, that where forfeiture of a vested estate is sought based upon the alleged breach of a condition subsequent which does not expressly limit the duration of the estate granted, it must be shown that the grantor, by express act, took advantage of the breach by re-entry, or that which in law would be equivalent thereto (bottom page 31 of the opinion).

Not only does this record show no express act by respondent's predecessors looking to re-entry because of the alleged losses sustained in the years 1934, 1935 and 1936, but the bank president swears (in May 1944) that the Alamo National Bank had *controlled* the property, either through W. H. Kennon or respondent for fifteen years prior to the trial (R 161). Thus is it conceded that during said years,

1934, 1935 and 1936, the moving spirit in this equation took no action, nor did it direct the taking of any action, looking to re-entry for the alleged breach of the implied obligation to maintain the lease on commercial production of oil or gas. Not only that, but the evidence and findings show that after the filing of complainant's suit in the state court on November 8, 1941, it continued to accept oil and gas royalties until January, 1943, after which such royalties were regularly tendered and refused to the date of trial (R 181); and that the bank president had numerous conferences with petitioner's representatives both before and after the filing of suit by respondent, looking to the drilling of a deep test and the readjustment of the lease in controversy thereto (R 162-163).

Assume for purposes of the discussion that the implied requirement of oil or gas production in paying quantities is applicable to the contract here involved and that respondent has established that there was a failure to thus produce at some undefined time more than five years before and continuously to the date of trial, such clearly would and could not constitute a limitation upon the duration of the estate, but at most would amount to the breach of a condition subsequent, which "the lessor must, by express act, take advantage of by re-entry, or that which in law would be equivalent thereto" (*Waggoner* v. *Sigler*, 19 S. W. (2) 27 (p. 31). Yet respondent would have this Court hold with its contention that an alleged loss which occurred before it acquired the property would suffice as grounds for

cancellation in the absence of proof of re-entry by the then owner and under conditions where it is conceded that up to the time of the filing of the suit there had been no move by it or its predecessors looking to re-entry, much less the "express act" held to be necessary therefor.

And another significant fact may be noted in connection with respondent's reply to this assignment, where it is asserted that during the years 1934, 1935 and 1936, "*petitioner* produced nothing but gas—no oil whatever." Respondent evidently overlooks the fact that by express provision in the lease the right of assignment was given, in whole or in part, and that "the development obligations hereinabove provided for shall be deemed to have been complied with whether performed by lessee or any of its assigns." The record is completely silent as to the extent of any such development or production, although the grant shows upon its face that an undisclosed number of oil and gas wells was expressly included therein; and surely it is not respondent's position that the burden rested upon petitioner, to avoid forfeiture of its vested estate, to show that it had made no assignments of portions of the leased premises and that its assignees had not met the implied condition of production of oil in paying quantities.

Furthermore, inspection of petitioner's income tax returns for the years 1934, 1935 and 1936 (as well as its other income tax returns) will disclose that there are many items not properly chargeable to operating expense, as that term has been defined

in *Garcia* v. *King* (164 S. W. (2) 27), as will be shown herein later.

III

The Equities

This case not being one where the estate automatically terminated because of the occurrence of a definite and ascertainable express or implied condition upon which its duration was made to depend, it is clearly of equitable cognizance (7 Tex. Jur., Sec. 2, p. 884; *Cooley et al* v. *Buie et ux.* (Comm. Ap., opinion adopted Tex. Sup.) 291 S. W. 876). And while it is true that where an estate can be said to have automatically ceased to exist by the happening at a definitely ascertainable time of an express or implied condition limiting its duration, such is not the situation here because respondent's pleadings, the findings and conclusions and the judgment all disclose uncertainty as to when the condition implied in the case at bar came about. Wherefore, it is submitted, the case should have been disposed of by applying several pertinent equitable principles to the undisputed and conceded facts which would have denied to respondent sympathetic consideration of its plea.

Respondent Does Not Offer To Do Equity.

In its abandoned complaint respondent evidently felt that it was only fair and right that petitioner

should be permitted to retain its eighteen oil and gas wells, with the right of ingress and egress thereto, but subject to the canny provision that none of these could be deepened (evidently to deprive petitioner of even that limited access to the known tremendous reserves of oil and gas at a depth of 3600 feet). This initial generous impulse is shown at page 9 of the record. However, respondent evidently experienced a change of heart when it came to file its current complaint, under which it successfully confiscated not only petitioner's leasehold estate, but its eighteen oil and gas wells. There is nothing of good conscience in such an attitude, particularly where respondent knew when its original complaint was filed in the state court that petitioner had obtained permits from the Texas Railroad Commission to drill fifteen wells for oil or gas and had completed seven of them when the war emergency and the rules and regulations of the Federal Government incident thereto caused a suspension of further drilling (such further comment as may be desired).

Respondent Does Not Come Into Court With Clean Hands.

It was petitioner's position before the trial court, and is now, that when the paralyzing effect upon all commercial and industrial activities struck this country with the impact of an unexpected blow in the face, any court, particularly a court of equity, should have given due consideration to the facts and circum-

stances shown by the record which piled handicap upon handicap against the full operation of this property, particularly as to the oil. But respondent promptly interposed technical, legal objections (which were not even good as legal propositions, as will hereinafter be shown) to according petitioner any equitable consideration, although respondent induced the trial court to find that petitioner's motive in attempting to maintain the lease on production was ulterior (Findings, paragraph 9, R. 180). In fact, the findings throughout are manifestly argumentative, evidenced by paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13) R. 178, 179, 180 and 181, as though, for instance, the fact that petitioner has no other assets than its several leases in this field can be relevant to the construction of a written contract entered into twenty-five years ago! No doubt the Alamo National Bank has ample assets (which presumably could not be utilized in oil and gas wildcatting), but it is quite certain from this record that respondent was in a worse fix as to assets than was petitioner, because the only asset it apparently owned (the fee title) was encumbered with a debt of $95,000.00. So that, if this case were to be decided upon a balancing of assets, respondent does not come out with such flying colors. At least, petitioner was possessed of sufficient resources to embark upon a campaign to drill fifteen wells, and it is not to be assumed that such could have been drilled, completed, equipped and placed on production at a cost of less than $2,000 each. In any event respondent does not show that it was capable of drilling the

deep test without utilizing the acreage in this lease therefor.

Respondent Says that the Term Provision of the Lease Creates a Determinable Fee but (a) thereby Assumes to be True that which Is in Dispute that the Word "Production" Means "Production in Paying Quantities" but (b) Fails to Give the Date when the Event Happened that Terminated the Lease.

(a) The lease provides "said lease to continue for the term of five years from this date and as long thereafter as oil or gas is produced from said lease premises by the lessee, its successors or assigns." The language is as plain as words can express. At no time has respondent or the District Court or the Court of Appeals pointed out any ambiguity in that language. There is nothing therefore in the Record or in the face of the clause itself that could in any way warrant any court to rewrite the phrase and stick on to it a qualifying phrase which drastically changes the meaning of the term provision. That is not denied either, namely, that it changes the meaning of the clause. This places the decision of the Court of Appeals in direct conflict with Texas authorities. 10 Texas Jr. 279, with the many Texas cases therein cited. Also see *Magnolia Petroleum Co.* v. *Cornellae* (Com. App.) 11 S. W. (2d) 158; *Southern Gas & Gasoline Eng. Co.* v. *Richardson* (Com. App.) 216 S. W. 158.

(b) Neither the respondent, the District Court, nor the Court of Appeals states the date within a

reasonable time when paying production ceased, if it did, which defendant specifically denies.

Respondent, in its reply brief, says "The lessee's legal title is determinable. When paying production ceases the legal estate dies by virtue of the limitation imposed upon it in the term clause." Reply to Petition for Certiorari, page 4.

The District Court, on the question as to when production "in paying quanties" ceased, found as follows:

Findings of Fact:

> "1. The defendant's wells on this lease ceased to be physically capable of producing oil and gas in paying and commercial quantities *in, or before, the year* 1934, etc." Tr. R. 180.

Conclusions of Law:

> "1. The mineral leasehold estate automatically terminated and expired by virtue of its own terms, provisions and limitations, upon the cessation of production in paying quantities which occurred *more than five years ago.*" Tr. R. 182.

If the respondent, the District Court, and the Court of Appeals do not know when the event occurred when petitioner's lease expired, how can this Court or anyone else speculate as to such date? Respondent did not acquire title to the land until June,

1937 and from that date until two years and three months after petitioner filed its suit it continued to accept the oil and gas royalties, that is, the monthly checks for the same.

The Foregoing Findings of the District Court are too Highly Inconsistent, Self-Destructive and Vague to be the Foundation of a Judgment.

The findings are too vague and inconsistent and self-destructive to justify any court's decreeing the taking of petitioner's property and giving it to respondent. They cover a range of one to fifteen or even twenty years within which the termination of the lease occurred, according to respondent's theory. Of course petitioner specifically denies that it has ever happened. Due process of law dictates that where a judgment of such consequence as this one entails, the date when the lease should have ended should certainly have been determined to a reasonable certainty, that is, within a few days. The very fact that respondent and the two courts have been unable to find anything in the record which would warrant them to name a date is sufficient proof that plaintiff's case has no merit.

Waiver and Estoppel Apply to a Determinable Fee as Well as to Any Other Claimed Right.

The Court of Appeals said that plaintiff's acceptance of royalties does not "operate as a waiver or an

estoppel to assert the claim that the rights of the taker as lessee have terminated."

That is error and is directly in conflict with the decisions of the courts of Texas. According to the District Court's Finding of Fact. No. 11, (Tr. R. 180) for more than ten years plaintiff and his predecessors have been taking their monthly checks, saying nothing and never complaining and plaintiff even took his royalty checks for two years and three months after suit was filed and predecessors and plaintiff stood by watching defendant and predecessors spending their money and drilling wells and never protested. Each one of those acts, accepting the monthly check and watching the defendant spend its money in drilling additional wells, meant that lessor considered that the lease was still in existence or that it constituted a mutual agreement between the two parties for the extension of the lease, assuming that the lease term was as contended for by the plaintiff, which petitioner specifically denies. *Mitchell* v. *Sims*, 63 S. W. 2d, 371 (Com. App.); *Guerra* v. *Chancellor* (Tex. Civ. App.) 103 S. W. 2d 775. See pages 780 for opinion on Motion for Rehearing.

Plaintiff did not commence its suit until the defendant had drilled its seventh producing well. In other words, it stood by and saw defendant spend its money in drilling additional wells when the plaintiff claimed that the lease had expired many years before plaintiff acquired the property. That consti-

tuted a fraud perpetrated upon the defendant. Under the circumstances, equity and ordinary justice required plaintiff to speak.

> "Waiver is the relinquishment of some right by word or conduct, while estoppel arises from the perpetration of a wrong, a fraud which has misled another to his injury and from which justice and equity would prevent him from receiving profit or benefit." 43 Tex. Jur. 893. See cases cited.

Respondent, on Page 6 of Its Reply to the Petition for Certiorari, Erroneously States "During those Three Years in which It Produced Gas Only, Petitioner, by its Own Admissions, Sustained Losses in its Current Operations from Gas Production Only."

The respondent, in its reply brief, page 6, says: "During those three years in which it produced gas only, petitioner, by its own admissions, sustained losses in its current operations from gas production only." The Record is wholly barren of any such admission made during the trial of the case in the District Court. In order to answer this charge, it will be necessary to go somewhat into detail as to what took place in the trial court.

At the close of the trial in the District Court, (Tr. R. 136-148) when petitioner, who was the defendant in that court, had rested its case. Petitioner, the plaintiff, introduced ten verified Wisconsin state income tax reports, including the years 1934-1943, in-

clusive. These were highly inadmissible without deleting many large items of expense which are proper deductions in an income tax report but do not come within the definition of "operating cost" as applied to the term used in connection with the issue involved in this case, as defined by the Supreme Court of Texas in the case of *Garcia* v. *King*, supra, which is:

> "It has been generally held that 'paying quantities,' when used in this connection, means paying quantities to the lessee. If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable. Ordinarily, the phrase is to be construed with reference to the operator, and by his judgment when exercised in good faith."

According to this, operating costs are limited to two things; the cost of bringing the oil from the producing structure to the surface and that of marketing it. Inasmuch as the Gas Ridge Field is not connected with an oil pipeline, the refinery trucks the oil from the field to the refinery, making a small charge of 10c per barrel therefor. As to gas, the pipeline company buying the gas has its line not only to the field, but to the meter on each lease. Consequently, as to gas, there is no marketing cost and as it lifts itself from the producing structure to the surface, there is no pumping cost. The gathering lines from the well to the meter were put in years ago and are small pipelines extending only a few yards. Thus there is no operating cost as to gas.

From the definition of operating costs as given by the Supreme Court of Texas, as applied to the production of oil and gas, they represent something vastly different and much more limited than allowable deduction expense in income tax reports, state and federal. Consequently, unless the income tax reports are thoroughly deleted of both the income and expense deductions, they are not admissible. Plaintiff used the income tax reports as they are, with no attempt made to analyze them, according to the definition of the Supreme Court of Texas just quoted. Defendant did analyze them and presented such analysis to the District Court and the Court of Appeals in briefs and oral argument.

Besides containing many items in large amounts which are proper deductions in an income tax report but not operating costs according to the Supreme Court of Texas, there are two other special items peculiar to oil production which must be deleted before the income tax reports are admissible; first in that in about 1925, lessor, the Land Company, was given the right by lessee, the Development Company, to drill on the lease under the condition that if production was had, then lessor and lessee were to share equally in the leasehold interest income after all expense was paid. Under this agreement, which was afterwards substantially put in writing, defendant's Exhibits 16½ and 17, the Land Company drilled five producing gas wells, Numbers 11, 12, 13, 14, and 15, some of which are still producing. This income which the Land Company re-

ceived from the ½ leasehold interest is called "divisional interest." This is therefore income from the leasehold estate and must be added to the income which defendant received in order to ascertain the income from the full leasehold interest.

The 1/8 interest income from the land, the landowner's royalty, must be deducted from the total production from the wells in figuring operating costs. The defendant, in making out its income tax report for the state of Wisconsin, therefore, had the right to deduct from the total production in dollars both the divisional leasehold income which was paid to the Land Company by defendant and the royalty in order to find its true income. Therefore, the income listed under royalty in the income tax report, consisting of both divisional interest and royalty, is correct as to the income tax report but gross error as to the operating costs because divisional interest paid to the Land Company is not operating cost. Consequently, in figuring operating costs from the income tax report, there are two corrections that must be made. The first is to take the divisional interest income out of the royalty income and second, put it into the leasehold income. That divisional interest of the Land Company was not income to the defendant but it is income to the leasehold estate. Addendum "I" gives the amount of the divisional interest income which was in the first place added to royalty income and in the second place taken out of leasehold income—double error.

Second, the income tax reports for 1934, '35, '36,

and the greater part of 1937 of oil production income is not contained in the income tax reports. During those years and for a number of years prior thereto, the oil wells on the Hamilton-Swain lease were owned and operated by A. W. Pausky. The latter part of 1937 defendant purchased these wells from A. W. Pausky and commenced to operate them in October, 1937. Consequently, in order to obtain the income from the whole leasehold estate, both oil as well as gas, it was necessary that Pausky's oil income during those years, amounting to about $10,000.00, must be added to what income defendant reported in its income tax in order to obtain the true leasehold income. See Addendum "II."

The foregoing are income corrections which must be made in the income tax reports if those reports are to be used at all in this case.

Likewise, there are in each income tax report expense items equally not includible under operating costs, as defined by the Supreme Court of Texas, totaling considerably in excess of $10,000. As an example of inclusion of items of expense proper as to an income tax report but wholly incorrect for items making up operating costs of production on an oil and gas lease is the following for the year 1939.

Directors' fee	$ 120.00
Legal and Traveling expenses	660.00
Accounting services	160.00
Interest expense	808.67

Franchise tax	21.00
Capital stock tax	9.00
Depreciation	678.71
And losses on leases and options (failure to exercise options)	5,400.73
Total	$8,508.32

The items of expense as to the other years' income tax reports, not proper operating costs, are listed in Addendum III.

It is immaterial as to operating costs, whether the company is a corporation or is owned by individuals or a partnership. Thus directors' fees and capital stock tax are not operating costs as defined by the Supreme Court of Texas. Likewise, traveling expense between Milwaukee, Wisconsin, and San Antonio, Texas, and legal fees have nothing to do with the cost of lifting the oil from the structure to the surface and marketing it. The same is true as to the other items. In 1937, the defendant was obliged to buy the fee of the Voges lease. The lessor had given a mortgage on the property which pre-dated the lease and the mortgagee was obliged to foreclose and did institute foreclosure proceedings against the lessor and defendant, lessee. The defendant was then forced to buy this land in order to save its lease. In buying it, the defendant put a mortgage lien of around $6,000 on the land. Every year defendant was obliged to pay interest, taxes and also a small amount on the principal. Depreciation is merely a paper deduction and certainly losses on leases and

options which had nothing whatsoever to do with the lease in question in this suit are obviously not operating costs of the Hamilton-Swain lease.

Addendum "II" gives the total production of both oil and gas, less royalties and operating costs, and income in excess of royalties and operating costs, as shown by the income tax reports when proper deletions are made.

Addendum "IV" gives the total gas production on all leases during the period from January 1, 1934, to and including May 31, 1944. Addendum "V" gives the gas production on the Hamilton-Swain lease during the same period. Addendum "VI" gives the oil production on the Hamilton-Swain lease during the same period and Addendum "VII" gives the net income from oil and gas production on the Hamilton-Swain lease from January 1, 1934 to December 31, 1943, first, when the operating costs of all leases are broken down to the Hamilton-Swain tract on a well basis and second on an income basis.

Respondent has never in any of its briefs taken issue with petitioner's analysis of the income tax report. It is submitted that respondent's use of the word "admissions" on pages 5 and 6 of its Reply Brief to the petition is not only unwarranted but highly misleading. The Wisconsin income tax reports of petitioner for the years 1934-'43 inclusive are to be found on pages 22-38 and are plaintiff's Exhibits 12-21 inclusive. See Exhibit Appendix. A

mere casual inspection will quickly evidence that each report contains many large items which must be deleted if the reports are to be admitted in evidence because they are not included in the expression "operating costs" as defined by the Supreme Court of Texas.

Again on page 6 of the Reply to the Petition of Certiorari of Respondent, at the end of the first paragraph, it is stated that petitioner "sustained losses in its current operations from gas production only, of $1,010.83 in 1934, $1,090.25 in 1935 and $413.32 in 1936. In the next paragraph it is stated "that the modest salary paid this *one field* employee, William Leslie, continuously exceeded petitioner's entire income from all its gas production. For example:

'Exhibit Appendix' Page	Year	Leslie's Salary	Total Gas Income
38	1943	$2070.00	$1,222.92
36	1942	1920.00	432.78
34	1941	1620.00	1,182.76

Counsel for respondent says "paid this *one* field employee," implying that there was more than one field employee when counsel for respondent well knew that there was no other field employee than William Leslie.

The foregoing quotation also wrongfully implies that William Leslie was employed by the defendant,

Gas Ridge, Inc., during the years 1934, '35, and '36. Miller knows different. Leslie was examined as an adverse witness by plaintiff's attorney, Mr. Miller, as follows:

> Question. "How long have you been out there in that work?"
>
> Answer. "Since January, 1940." Tr. R. 50.

There are seven producing leases in the Gas Ridge field owned by petitioner, the Hamilton-Swain being only one of them. They are operated on the unit system, that is, they have one power plant for pumping the oil and *one* employee taking care of the pumping equipment, pumping the oil each day. Consequently, all operating costs must not be charged to the Hamilton-Swain lease as the statement of respondent in his brief on pages 5 and 6 implies, but must be allocated among the various leases.

In 1934, '35, and '36, petitioner, the defendant, merely operated the gas production. During those years A. W. Pausky owned and operated the oil wells under the lease, the subject of cancellation. The total production of oil and gas on all leases minus royalties and operating costs in 1934 was $5,281.95, in 1935, $5,465.02, 1936, $4,774.45. See Addendum II. Both the gas and oil were produced under the same leases. The two productions—oil and gas—must be taken together in determining whether or not the leases were operated at some profit. Addendum IV also gives the total production of oil and gas on all leases for the ten year period and income

in excess of operating costs and royalties. Addendum VII gives the net income of both oil and gas minus royalties and expenses on the Hamilton-Swain lease, the expenses being allocated both on the basis of the number of oil wells and also on the income basis.

The Circuit Court of Appeals passed over this issue without a comment. Defendant had the constitutional right to have had the Court of Appeals pass upon the questions of whether the items of expense listed in the income tax report which defendant says are not operating costs, as tested by the definition of "operating costs" as given by the Supreme Court of Texas are not operating costs. It was the duty of the Court of Appeals to have made a judicial determination of the same. The failure of that Court to pass upon those questions has resulted in taking defendant's property and giving it to plaintiff in violation of the Due Process Clause of the Constitution of the United States. In this failure of said Court to pass upo nthe question of whether defendant's analysis of the income tax reports was erroneous or correct in whole or in part, it has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned a departure by the District Court as to call for the exercise of this Court's power of supervision.

The Burden of Proof in this Case Was Upon the Respondent, the Plaintiff, in the District Court.

Persky v. *First National Bank of Vernon*, 117 S. W. 2d, 861.

"Syllabus. The burden of showing that an oil well is not producing in paying quantities, so as to authorize cancellation of the lease, is on the party seeking cancellation."

"The records show the gross income from the well was more than $50 per month. The appellant says that his total expense involved in making that revenue has not been more than $50 any month since he purchased the lease. The appellee does not show any other expenses incurred by the appellant, and the burden in this respect is upon the appellee."

The War Generally and the War Directives Issued by the President and the War Board Greatly Affected Production of Oil. However, the District Court Held and Its Finding Was Upheld by the Court of Appeals that inasmuch as the Lease Contained "No Saving Clause," It Could Not be Pleaded as a Defense.

Early in 1941, the defendant secured 15 permits to drill shallow oil wells on the Hamilton-Swain tract. The drilling of these shallow wells was commenced before this suit was filed. In fact, 6 of these wells had been completed and were producers by the time defendant had been served with the citation and complaints. While drilling the 7th well in December, 1941, drilling was stopped by order of the OPA but defendant was allowed to complete the 7th well. Thus the defendant was stopped from carrying out its program of drilling a number of shallow producing oil wells, by virtue of the war exigencies and regulations.

The oil production on Gas Ridge has been continued for about 20 years. The amount produced was never enough to warrant the building of a pipe line to a refinery. Thus the oil was picked up by a loca lrefinery by its trucks. According to the testimony of the refinery's manager, Mr. Slimp, defendant suffered through the war not only its own griefs but also those of the refinery in its transporting and refining of the oil. Refinery's trucks broke down, repair parts could not be obtained, repairmen had gone to the war factories for more pay, new trucks could not be purchased, nor could secondhand ones be picked up. Transcript of Record, 121. The same was true as to repairs in the refinery. Sometimes the breaking of a small gadget would stop the refining process for a long time because it could not be replaced by the supply houses in San Antonio. When the refinery trucks could not transport the oil because of the unavailability of trucks or because the refinery ceased refining the oil, production of oil on the lease must stop.

Thus the stripper well subsidy on oil production was pay not merely for future production but for what their owners had before suffered from the directives of the War Department and other exigencies of the war. The case was tried in the District Court on May 17 and 18, 1894. The Court took the case under advisement and did not render its decision until October 4, 1944.

On or about July 12, 1944, the OPA promulgated a regulation providing for a subsidy for stripper oil

wells. This regulation specifically provided that any and all oil produced on Gas Ridge, Bexar County, Texas, was entitled to a subsidy to be paid by the Government of 35c per barrel, commencing with August 1, 1944. On or about September 1, defendant filed a motion to re-open the case for the purpose of introducing these regulations and showing their effect upon the income arising therefrom. Tr. R. 166-175.

The 35c subsidy per barrel of oil produced is all net income. The fact that the purchaser of the oil pays this 35c per barrel in addition to what he paid before and is being reimbursed for this 35c per barrel extra pay by the Government does not add to the taxes of the producer nor does it increase the amount of the operating costs. The 35c per barrel is therefore a net gain and a very substantial one.

It is a familiar doctrine that an appeal in an equity suit opens up inquiry as to the time of the ultimate decision.

In the recent case of *Public Utilities Commission* v. *United Fuel Co.*, 317 U. S. 456, 466, this court said:

> " . . . It is the case that is here now that must be decided, and it must be decided on the circumstances that exist now. Cf. Vandenbark v. Owens, Illinois Co., 311 U. S. 538, 542, 543, and cases there recited."

The District Court denied the motion of the defendant to re-open the case. In its Conclusions of Law No. 4, Tr. R. 182, it held that the defendant was not entitled to the foregoing war considerations, exigencies, and financial loss due to war directives because the lease "contains no saving clause." This, by silence, was affirmed by the Circuit Court of Appeals. The result of it all is that defendant's property has been taken through the decision of the District Court which is in direct conflict with the decision of this Court, *East N. Y. Savings Bank* v. *Hahn, et al*, decided November 5, this year. 90 L. Ed p. 9.

> "The formal mode of reasoning by means of which this 'protective power of the State,' 290 U. S. at 440, 78 L. Ed. 430, 54 S. Ct. 231, 88 ALR 1481, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it; whereby the State's exercise of its power enforces, and does not impair, a contract."

This principle is equally applicable and commanding when "the protective power" of the Federal Government is involved.

When the Court of Appeals Says "Production" Means "in Paying Quantities" It Denies Petitioner Its Constitutional Right of Contract.

The term clause in the lease says: " . . . for the term of five years from this date and as long there-

after as oil or gas is produced from said premises by lessee, its successors or assigns, etc." That language speaks for itself. There is no vague word or phrase in it and it is therefore unambiguous. At no time has the respondent and at no time did the District Court or the Court of Appeals point out any ambiguity in that language nor did it make any claim to that effect at any time. The Court of Appeals was therefore powerless to add a limiting phrase to a word of definite meaning. To attempt to do so would be an act of judicial usurpation.

> "The law leaves the contract just where the parties themselves have put it, and the courts will enforce it as made, without regard to questions as to whether the parties contract wisely or foolishly, or as to whether, in the light of subsequent events, a hardship may be worked.
>
> "Accordingly, the courts have often said that they cannot make a new contract for the parties nor add to, modify, vary, or change in any particular the contract as made, . . . " 10 Tex. Jur,, 279. See the many cases cited in the footnotes.

The phrase "in paying quantities" is used in this lease for the purpose of measuring the amount of production but in reference to something different than defining the term of the lease, namely:

> "The lessee agrees to commence actual drilling upon said property of an oil or gas well on or before Two Hundred Twenty days from date hereof and to complete same with reasonable diligence and dispatch to a depth of not less than

> Twelve Hundred feet unless oil or gas *in paying quantities* be found by lessee at a lesser depth," etc. Petition for Certiorari, p. 43.

The foregoing use of the phrase "in paying quantities" in the same instrument forbids any court to say that the word "production" in the term clause means "production in paying quantities."

The term clause in the lease as written is not prohibited by statute or forbidden by public policy. Neither the respondent nor the District Court nor the Circuit Court of Appeals has at any time made any claim to the contrary. Therefore, the decision of the Court of Appeals denies petitioner the right to make a contract which provides for an extension of the lease beyond the primary term for a period "as long thereafter as oil or gas is produced."

The right to make a contract in relation to one's own business is a part of the liberties protected by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States. *Lochner* v. *New York*, 198 U. S., 53; *Coppage* v. *Kansas*, 236 U. S. 1; *Chicago, etc. R. Co.* v. *McGuire*, 219 U. S. 549.

> "In the absence of some positive law to the contrary, the right of contract is a necessary incident to the right to own and hold property. The liberty to make a contract for a lawful purpose is a *natural* right which is beyond the power of government to take from a citizen." 10 Tex. Jur. 16, citing St. Louis R. R. Co. v. Book-

er (Tex. Civ. App.) 5 S. W. (2d) 856, Certiorari denied. 279 U. S. 852.

The only way that this constitutional issue can be avoided in this case is as hereinbefore contended or by finding that lessor and lessee, when they executed the lease, intended exactly what the language in each instance expressed and inasmuch as in the case of *Garcia* v. *King*, the phrase "in paying quantities" does not appear in the lease involved, therefore, that case cannot be decisive of the case at bar. As there is no dispute in the case before this Court and as there has always been and still is both oil and gas production, the lease is still in full force.

The Decision of the Court of Appeals that Plaintiff Was an Innocent Purchaser is Wholly Unsupported by the Documentary Evidence.

The Court of Appeals says: "Complainant acquired its title to this land from E. C. Tarrant . . . without notice, actual or constructive, of the existence of the unrecorded document introduced in evidence as its Exhibits 14, 15, 16, and 16½. This is error, as we shall see immediately.

The lease in question in this case was executed on December 7, 1920, by Hamilton Land & Development Company, sometimes referred to as the Land Company, lessor, with the San Antonio Oil & Natural Gas Company as lessee. It was recorded on December 9, 1920 in Volume 619 on pages 470-572 of the Deed Records of Bexar County, Texas. W. H. Kennon

was at that time the secretary of the lessor corporation and attested the signature of its president, V. E. Hamilton.

Plaintiff did not acquire the fee title until June, 1937, when this lease was still outstanding and in full force. At that time, W. H. Kennon was the president of the plaintiff corporation. Shortly after December 7, 1920, the San Antonio Oil & Natural Gas Company assigned its lease to the Gas Ridge Development Company, sometimes referred to as the Development Company.

The plaintiff not only acquired lessor's interest in the Hamilton-Swain tract which is covered by the lease but also acquired an interest in the leasehold estate held by the Development Company in the following manner. On August 26, 1922, the Development Company, by written contract, conveyed certain drilling rights to one M. M. Sweetman who, in the same contract, assumed certain drilling obligations. This instrument, Defendant's Exhibit 14, was recorded in the Bexar County Deed Records on August 28, 1922, in Volume 682, page 552. Plaintiff acquired those drilling rights and assumed the drilling obligations through the following instruments:

Assign. Sweetman to Southern Nat. Gas Co. Jan. 10, '35, Recorded in Vol. 1459, p. 381.

United Gas Pub. Service Co., Assignment Union Producing Co., Sept. 25, 1937, Recorded Vol. 1607, p. 488.

Union Producing Company to Suburban Agricultural Properties, Inc., Sept. 30, '42.

Thus this petitioner acquired and still owns drilling rights of M. M. Sweetman on its own land.

The plaintiff, that is, respondent, also acquired drilling rights and drilling obligations from the Hamilton Land & Development Company who, in turn, had acquired such rights and drilling obligations from the Gas Ridge Development Company carved out of the latter's leasehold estate.

In 1925, some kind of an arrangement or contract must have been entered into between the Land Company and the Development Company for the joint drilling of five gas wells in which each party agreed to pay one-half of the cost of drilling and equipping the wells and each was to receive one-half of the net profit. During that year those five wells were drilled as in defendant's Exhibit "A," pages 3-12, the ½ divisional interest in the leasehold profits as to those wells were paid by the Development Company to the Land Company. See Addendum "I."

In January, 1937, a written contract was made and entered into by and between the Land Company and the Development Company similar to the arrangement whereby the five gas wells were drilled. Defendant's Exhibit 16½, Exhibit Appendix, page 59. See Addendum "VIII."

True, this instrument never was recorded but it

is referred to and its main provisions were incorporated in another instrument dated March 30, 1932 entered into between the Hamilton Land & Development Company by W. H. Kennon, president, and the American Gas Company and which was recorded in Vol. 1301, pp. 137-139, Bexar County Deed Records, Texas on April 1, 1932. See Addendum "IX." This was five years before respondent acquired its property in June, 1937. This instrument is defendant's Exhibit 17 and it is found in Exhibit Appendix, p. 61. One glance at these two instruments will show that the latter not only incorporates practically all of the former, but relates the joint drilling of the five gas wells, 11, 12, 13, 14 and 15 of the Hamilton-Swain lease. On June 28, 1937, when the Suburban Agricultural Properties acquired the Hamilton-Swain tract from the Alamo National Bank, the president of the Suburban Agricultural Properties, Inc., was W. H. Kennon who was secretary of the Land Company when it executed its lease to the San Antonio Natural Gas Company on December 7, 1920 and who was president of the Hamilton Land & Development Company when that company made its contract with the American Gas Company on March 30, 1932, just described.

Furthermore, on the same day on which plaintiff acquired the fee title to the Hamilton-Swain tract on June 28, 1937, the plaintiff by its president, W. H. Kennon, executed a deed of trust to S. J. Weyel, Jr., trustee, with the Alamo National Bank as beneficiary, to secure the payment of a promissory note in

excess of $95,000 made payable to the Alamo National Bank.

Thus Suburban Agricultural Properties not only had constructive but actual knowledge of that one unrecorded instrument, Defendant's Exhibit 16½, and of its contents.

The Court of Appeals says that plaintiff acquired good title through E. C. Tarrant. This is without any foundation. On October 31, 1928, the Hamilton Land & Development Company gave its deed of trust to Gus J. Groos for the benefit of E. C. Tarrant as beneficiary, covering the Hamilton-Swain tract, to secure the promissory note for $20,000. Tr. R. p. 123. The Hamilton-Swain lease thus predated the deed of trust by nearly eight years and the Sweetman contract which was recorded August 8, 1922, predated the deed of trust by six years.

On June 19, 1937, by special warranty deed, E. C. Tarrant, who had acquired the property of the Hamilton-Swain tract by foreclosure of the trust deed, conveyed it to the Alamo National Bank, the special warranty being "This conveyance is made subject to any and all outstanding oil, gas, and mineral leases and assignments thereof covering and affecting the real estate and premises hereinabove described and hereby conveyed." This was nine days before the Alamo National Bank conveyed the same property to the Suburban Agricultural Properties, Inc. This instrument (Tarrant to the Alamo National Bank was recorded in the Deed Records of

Bexar County on June 24, 1937. The instrument executed by the Alamo National Bank to the suburban Agricultural Properties, Inc., was also a special warranty deed, as follows:

> "To Have and To Hold, etc., Warrant and Forever Defend, etc., by, through or under grantor herein."

Any knowledge possessed by an officer of a corporation, as to matters within the scope of his authority, while he occupied such relation, is notice to the corporation, whenever it may have been acquired. *Waggoner* v. *Herring-Showers Lbr. Co.*, 40 S. W. (2d) 1, (Sup. Ct.).

> " . . . The corporation is charged with notice when its officers have knowledge of facts that would put a reasonable person on inquiry when reasonable inquiry would reveal the information. . . . " Hildebrand, Tex. Corp. Vol. 2, p. 650.

The Agreement between the Land Company and the Development Company Just Discussed, whereby Their Relationship as Lessor and Lessee was Modified, Created a Co-Tenancy as to the Leasehold Estate and a Joint Venture in the Development and Operation of the Lease whereby the Right of Action which Plaintiff Has, If Any, Would be Partitioned.

The Court of Appeals says that appellant, by virtue of certain contracts made between appellee's and appellant's predecessors, claimed a change of

"lessee's title from a determinable to an absolute fee." No such claim was made and there is nothing in the record to substantiate it. The Court of Appeals used that as a basis for its decision on this question. The only title which appellant ever claimed it received was by virtue of the oil and gas lease, the subject of this litigation, which is still in force, as appellant contends. In 1925, the Land Company and the Development Company entered into an agreement which, so far as is known now, was oral, whereby lessor was given the right to drill for oil or gas on the lease and in which agreement lessee was released from the obligation of developing the lease, each party agreeing to pay one-half of the development costs and each to receive one-half of the net income therefrom. Five producing gas wells were drilled that year, some of which are still producing. Subsequently thereto, in January, 1927, a written instrument was executed between the two parties which substantially embodied the foregoing provision. This instrument is Defendant's Exhibit 16½ to be found in the Exhibit Appendix, pages 59-60. The material parts of this Exhibit are to be found in Addendum VIII.

This contract whereby both lessor and lessee were given the right to drill is more or less an anomaly in the oil production business.

The foregoing agreement created a co-tenancy in the drilling rights in the leasehold estate of the defendant.

> "The estate (of a co-tenancy) may consist of any character of property subject to individual ownership, and the tenants may embrace any and all persons, whether natural or artificial, capable of owning such property." 11 Tex. Jur. 415, citing Broom v. Pearson 98 Tex. 469, 85 S. W. 790, 86 S. W. 723.

Plaintiff, in its first amended complaint, paragraph 14, pleads as follows:

> "Partition. If the lease hereinabove referred to has been maintained in full force and effect, which is not admitted, but denied, then and in that event only, this complainant alleges that it, the complainant, under and by virtue of the conveyances, contracts, and judgment enumerated in the preceeding paragraph, is the co-owner with defendant of said lease; that complainant and defendant, as tenants in common, are the sole owners of said lease and all rights thereunder; that the rights, titles and interests in the leasehold estate of this complainant demands a partition of said estate between the defendant and the complainant." Tr. R. 13.

The foregoing was an executed contract. The divisional interest of the leasehold estate income since and commencing with 1925 is to be found in Addendum No. I. That is what the plaintiff and its predecessors for many years have received.

Plaintiff as successor to the Land Company now has the same right of drilling which the Land Company had and exercised.

The right of action, if any, that plaintiff may have is for partition of the drilling rights under the foregoing contract. Apparently, plaintiff's plan is to dispossess the defendant and then drill, so as to cut off defendant's right.

A Public Interest of Inestimable Value is Involved.

The Public, the third party, is involved greatly because the production of oil and gas at all times is something in which the Public has a very vital interest. Therefore, there must not be any waste of natural resources. Waste, while it includes unnecessary blowing of oil and gas into the air, which is only a very small item, includes the loss of natural gas and oil underneath the surface of the earth and one of the ways of wasting natural resources in detriment to the public interest consists of failing to take out all the natural gas and oil that can be recovered.

Inspect the Addendi following this Answer to respondent's Reply Brief. The decision of the Court of Appeals in effect says that oil and gas should never have been produced, because the Finding of Fact, No. 11, Tr. R. 180, of the District Court says that "defendant's wells on this lease ceased to be physically capable of producing oil and gas in paying and commercial quantities in, or before, the year 1934," yet the OPA, in July, 1944, promulgated the stripper well subsidy in which the oil production on Gas Ridge was given a subsidy of 35c

per barrel. Tr. R. 170. That is, this field was mentioned specifically as entitled to 35c per barrel subsidy.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue in this cause to the United States Circut Court of Appeals for the Fifth Circuit.

ARTHUR H. BARTELT,
Attorney for Petitioner,
P. O. Box 190
Austin, Texas

FAGAN DICKSON,
Of Counsel
Austin, Texas.

ADDENDUM I

Income Received by Lessor Land Company, Respondent's Predecessor from Divisional Interest in the Leasehold Estate of an Undivided One-Half Interest ever since 1925 in Addition to Lessor's One-Eighth Landowner's Royalty.

Early in 1925 lessor, the Land Company, was given the right by lessee, the Gas Ridge Development Company, to drill on the Hamilton-Swain lease on the condition that if production resulted therefrom, then each company was to pay one-half of the cost of the drilling and equipping of the well and each was to receive one-half of the net income.

Early in 1925 five producing gas wells were drilled. The following is the amount which the Land Company received out of the net income from the gas produced by said wells out of its one half divisional interest in the leasehold estate. This is in addition to what the Land Company received as lessor in the way of landowner's royalty of a 1/8. The following is the divisional interest income of the Land Company since 1925:

1925	$3,671.46
1926	1,489.95
1927	1,755.72
1928	1,762.70
	$8,679.83

Defendant's Exhibit B, pp. 8-9.

(During missing years field operated by trustee and figures are not available.)

1934	$ 667.98
1935	493.93
1936	348.61
1937	252.02
1938	210.17
1939	262.73
1940	269.34
1941	173.61
1942	104.95
1943	155.11
	$2,938.25

Defendant's Exhibit "A," pp. 3-12.

	$8,679.83
	2,938.25
Total	$11,618.08

ADDENDUM II

Production of Oil and Gas on All Leases

Year		Income Less Royalty	Minus Operating Costs	Income In Excess of Royalties and Operating Costs
1934	Gas	$ 4,225.95		
	Oil	* 3,000.00	$ 1,944.00	$ 5,281.95
1935	Gas	3,312.02		
	Oil	* 3,000.00	847.00	5,465.02
1936	Gas	2,757.45		
	Oil	* 2,800.00	783.00	4,774.45
1937	Gas	2,389.63		
	Oil	* 2,700.00	1,160.00	3,929.63
1938	Gas	2,087.29		
	Oil	2,691.14	2,216.00	2,562.43
1939	Gas	2,082.71		
	Oil	2,096.07	2,341.00	1,837.78
1940	Gas	2,032.96		
	Oil	1,932.04	2,992.00	973.00
1941	Gas	1,623.39		
	Oil	2,385.63	3,225.00	784.02
1942	Gas	910.02		
	Oil	3,627.18	3,474.00	1,063.20
1943	Gas	1,536.52		
	Oil	2,272.92	3,378.00	431.44
1944	Jan 1 to May 31:			
	Gas	767.44		
	Oil	842.97	1,448.00	162.41
Total	Gas	$23,725.38	$23,808.00	$27,265.33
	Oil	27,347.95		

Grand Total ---------- $51,073.33

(Defendant's Exhibit A, pp. 3-13 inclusive)

*As is shown in Defendant's Exhibit "C", page 3, defendant did not purchase or operate the oil wells and their production from A. W. Pausky until some time in the middle of 1937 and did not commence to operate these wells on the Hamilton-Swain tract and the other two leases that produced oil until about October, 1937. Consequently, A. W. Pausky's oil production for the first 4 years must be added. Even if the defendant did not own this production on the Hamilton-Swain lease in 1934, '35, '36, and '37, nevertheless, that income from such oil production necessarily must be considered if and when figuring whether the leases were producing oil or gas at a profit.

The exact oil production during the years just mentioned is not known but in 1938, according to the above schedule, the value of the oil production that year, after royalties were deducted, was $2,691.14. No new wells were drilled until October, November and December of 1941. It is common knowledge that production from shallow oil wells decreases each year. Between 1938 and 1939 these wells decreased in oil production to the value of $600 and between 1939 and 1940 approximately $150. Therefore an estimate that these wells produced in 1934 $3,000 worth of oil, the same in 1935 and 1936—$2800 and in 1937—$2700 less royalties is conservative.

Adding the royalties of 1/7 of all the gas produced the gross production of gas would be	$27,679.61
Adding royalties of 1/8 of all the oil produced the gross production of oil would be	$31,254.86
Grand total of	$58,934.47

ADDENDUM NO. III

The following are items of deductible expense listed in the Income Tax Reports of defendant from 1934 to and including 1943. These are deductible in an income tax report but are not operating costs under the decision of Garcia v. King (supra).

1934

Legal fees	$ 552.00
Office rent	180.00
Directors' fees	246.00
Accountant service	120.00

Franchise tax	21.60
Capital stock tax	15.00
Total	$1,134.60

1935

Directors' fees	$ 248.00
Accounting services	150.00
Legal fees	574.00
Office rent	180.00
Interest paid	20.00
Franchise tax	21.30
Capital stock tax	13.00
Depreciation	338.75
Total	$1,765.00

1936

Directors' fees	$ 138.00
Legal fees	385.00
Accounting fees	60.00
Interest paid	240.00
to Dallas Joint Stock Land Bank. This $240 is on the mortgage of the Voges fee of 136 acres.	
Promotion and stock sales exp.	110.00
Capital stock tax	10.00
Depreciation	303.75
Total	$1,273.75

1937

Legal fees	485.00
Accounting services	1.60
Interest	483.00
Promotion and stock sales exp.	26.50
Franchise tax	24.84
Capital stock tax	9.00
Traveling expenses	255.05
Depreciation	169.68
Total	$1,613.07

1938

Directors' fees	$ 170.00
Accounting and legal fees	555.00
Interest	578.24
Franchise tax	21.60
Capital stock tax	10.00
Traveling expense	139.65
Depreciation	205.00
Total	$1,679.49

1939

Directors' fee	$ 120.00
Legal and Traveling expenses	660.00
Accounting services	160.00
Interest expense	808.67
Franchise tax	21.00
Capital stock tax	9.00
Depreciation	678.71
And losses on leases and options (failure to exercise options)	$5,400.73
Total	$8,508.32

1940

Profit and loss statement missing from income tax report.

1941

Legal and supervision	$ 330.00
Interest expense	203.84
Professional fees	120.00
Sundry	27.37
Depreciation	825.91
Capital Stock tax	18.75
Franchise tax	48.30
Real Estate tax	75.76
Total	$1,649.93

1942

Legal expense	$ 185.00
Interest expense	371.71
Capital stock tax	1.25

State franchise tax	29.00
Professional fees	135.00
Travel	188.61
Depreciation	843.93
Total	$1,754.50

1943

Legal fees	151.00
Accounting	120.00
Interest	358.82
Depreciation	671.64
Total	$1,301.46
Grand Total	$20,680.02

ADDENDUM IV

Gas Production on All Leases

The following is the production of gas on all the leases deducting royalties from 1934 to March 31, 1944. These figures are taken from Appellant's Ex. "A," 1-13, blue pencil paging.

Year	Gross Income of Gas on All Leases	After Deductions of 1/7 Royalty
1934	$ 4,930.27	$ 4,225.95
1935	3,864.02	3,312.02
1936	3,217.02	2,757.45
1937	2,787.90	2,389.63
1938	2,435.17	2,087.29
1939	2,429.81	2,082.71
1940	2,410.28	2,032.96
1941	1,893.95	1,623.39
1942	1,061.67	910.02
1943	1,792.60	1,536.52
1944—		
5/31	893.35	767.44
Total	$27,718.35	$23,725.38

ADDENDUM V

Gas Production on Hamilton-Swain Lease

The following is the production of gas on the Hamilton-Swain lease, deducting royalties and taxes from 1934 to March 31, 1944. The figures are taken from Defendant's Exhibit C, pp. 4 to 9.

1934	$1,052.01	$ 901.87
1935	935.32	801.70
1936	738.06	632.62
1937	518.72	444.62
1938	422.23	361.91
1939	361.56	309.91
1940	374.40	320.92
1941	325.81	279.27
1942	194.26	167.94
1943	232.62	199.62
Total Jan., Feb., Mar. 1944-80.85		69.30
		$4,489.68
Total	$5,245.52	

ADDENDUM VI

Oil Income on Hamilton-Swain Lease

Gross Income of Oil on H-S Lease from Figures Taken from Defendant's Ex. C. pp. 4 to 9.

Oil Income After Deduction of Royalty and Production Tax

1934	$2,055.99
1935	1,905.99
1936	1.755.99
1937	1,605.99
1938	1,455.99
1939	919.22
1940	860.91
1941	1,136.90
Seven of the oil wells were brought in as producers the last months of 1941	
1942	2,388.63

Oil Income After Deduction of Royalty and Production Tax

1934	$1,142.74
1935	1,142.74
1936	1,142.74
1937	1,142.74
1938	1,142.74
1939	804.32
1940	753.30
1941	994.79
1942	2,090.05

Difference due to 7 new wells drilled. What a difference there would have been if defendant had been allowed to drill all 15 wells!

1943 ---------- 1,378.24 1943 ---------- 1,205.96

This decrease shows how refinery war troubles affected production as defendant could not produce more than refinery could truck away.

Total ----------$15,403.65 Total -------$11,562.12

Total Production on H-S ----------$15,403.65 Oil Production

5,245.74 Gas Production

$20,649.39 Total Oil & Gas

ADDENDUM VII

The following is the net income from oil and gas production on the Hamilton-Swain lease itself in excess of royalties and the operating cost of all the leases, when broken down to the Hamilton-Swain tract, first on the well basis and second, on an income basis.

Well Basis
Appellant's Brief, Pages 107 to 112

Year	Net Income
1934	$ 553.87
1935	649.70
1936	492.62
1937	367.36
1938	1,045.65
1939	629.27
1940	453.22
1941	515.62
1942	1,085.94
1943	326.62
Total	$6,119.97

Income Basis
Appellant's Brief, Pages 112-116

Year	Net Income
1934	$ 474.87
1935	689.61
1936	448.62

1937	575.36
1938	783.65
1939	468.27
1940	237.22
1941	332.62
1942	413.94
1943	88.62
Total	$4,512.78

Defendant's Exhibit "C", pp. 4-9.

ADDENDUM NO. VIII

The following are the two main paragraphs of that contract: (Defendant's Ex. 16½, Ex. Appendix, 59)

"1. The Land Company hereby releases the Development Company, its predecessor, successors or assigns, from the obligation to further develop said property, or any part thereof, for oil or gas, and hereby recognizes title in the Development Company, its successors or assigns, free from forfeiture, to all oil or gas wells drilled by said Development Company, its predecessors or assigns upon the above described property, except a one-half interest in certain gas wells thereon now owned by the Land Company.

"2. The Development Company hereby gives and grants unto the said Land Company, its successors or assigns, the right to drill wells for oil or gas upon any part of said property, and in the event production of either oil or gas in commercial quantities results therefrom, the Land Company will own such production, subject to payment to the Development Company of the royalties provided by said instrument of May 24, 1924, to-wit: one cent per thousand cubic feet of gas and one-eighth of oil; and further, in the event of such production, the Land Company, its successors or assigns. will have the sole right to further develop for oil or gas an area around the discovery well extending a distance of twenty-five hundred feet in every direction therefrom, subject to the obligation of the Land Company in such contingency to reasonably develop such area with reasonable diligence."

ADDENDUM NO. IX

Defendant's Exhibit 17, Exhibit Appendix 61.

"Assignment by the Hamilton Land & Development Company, by W. H. Kennon, president, to American Gas Company, dated March 30, 1932. Recorded April 1, 1932, in Vol. 1301, pp. 137-139, Bexar County Deed Records.

* * * *

"Whereas, thereafter said original instrument was by mutual agreement of the parties again modified to provide for the right in said Hamilton Land & Development Company, its successors or assigns to drill for oil or gas upon said premises and to own any production resulting therefrom, subject to the payment of a royalty to said Gas Ridge Development Company of one cent (1c) per thousand cubic feet of gas and one-eighth of the oil. The latter agreement is evidenced by authorization therefor in the minutes of said Land Company and copies of the contract entered into contained in its files; and

"Whereas, at the joint expense of said Hamilton Land & Development Company and said Gas Ridge Development Company, five certain gas wells were drilled upon said premises and are jointly owned by said companies; and

"Whereas, the Hamilton Land & Development Company has agreed to assign, convey and deliver each and all of its rights and privileges in said original lease and modifications, together with the five gas wells, subject to the overriding royalty to the Gas Ridge Development Company under the terms of the original and modified lease agreement:

"Now, therefore, in consideration of the premises and of $10.00 and other valuable considerations to it in hand paid, the Hamilton Land & Development Company does hereby assign, transfer, convey, and deliver unto the American Gas Company, its successors and assigns, each and every drilling right and privilege to which it may be entitled upon said above described premises, together with all the right, title and interest of grantor in and to said five gas wells, known as H. & S. Nos. 11, 12, 13, 14, and 15, and all of the right, title and interest of grantor as lessor in said original lease

and modifications, it being understood that this assignment is made expressly subject to the overriding royalties upon oil and gas to which said Gas Ridge Development Company may be entitled, and to the fee royalties payable to grantor under the terms of said original and modified lease agreements.

"As a part of the consideration hereof, said American Gas Company does hereby assume and agree to perform all of the obligations resting upon grantor under the provisions of any of the aforesaid instruments.

Hamilton Land & Development Company

By W. H. Kennon, President American Gas Company

By H. A. Pagenkopf, President

FEB 18 1946
CHARLES ELMORE CROPLEY
CLERK

NO. 653

IN THE

Supreme Court of the United States

GAS RIDGE, INC.,
Petitioner.

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent.

PETITION OF GAS RIDGE, INC., FOR REHEARING

ARTHUR H. BARTELT,
Attorney for Petitioner,
Austin, Texas.
FAGAN DICKSON,
Of Counsel,
Austin, Texas.

FIRM FOUNDATION—AUSTIN

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CONSTITUTIONAL PROVISION

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STATUTES

Vernon's Texas Civil Statutes, Annotated, Arts. 6008 et seq., at p. 192; Arts. 6050 et seq., at p. 287 13

NO. 653

IN THE

Supreme Court of the United States

GAS RIDGE, INC.,
Petitioner,

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.,
Respondent.

PETITION OF GAS RIDGE, INC., FOR REHEARING

To the Supreme Court of the United States:

It is with considerable diffidence that petitioner seeks a rehearing of the judgment of this Honorable Court denying certioari in the above cause, entered on January 28, 1946.

However, in view of its earnest conviction that under the conceded facts the decision of the Circuit Court construing the legal effect of the contract involved is in conflict with decisions of the Supreme Court of Texas *in W. T. Waggoner Estate* v. *Sigler*

Oil Co. (19 S. W. (2) 27; *Watson* v. *Rochmill* (155 S. W. (2) 783; and *Decker* v. *Kirlicks* (216 S. W. 385); and because of the paramount importance of the issue to stripper lease operators in Texas and in other jurisdictions, petitioner feels justified in requesting the Court's indulgence to reexamine the controlling law questions in the case.

THE FIRST ASSIGNMENT OF ERROR

The Circuit Court said (emphasis added): "The opinion of the Supreme Court in Garcia's case (164 S. W. (2) 509) leaves in no doubt: that 'production' as used in the lease in question means 'production in paying quantities'; that the continuation in force of the lease depended on the continuation of such production; and that *when* that ceased, the lease *automatically* terminated."

Thus, the Circuit Court gave an effect to the decision of extending beyond the primary term the condition there implied, whereas the Texas Supreme Court specifically restricted such implication to the condition in this respect existing at the *end* of the fixed period; and necessarily so, as petitioner urges, because to project such implication beyond said definitely provided date would rest an implied limitation of title upon "the existence or nonexistence of a state of facts not clearly defined," which will not be done in support of forfeiture *Benavides* v. *Hunt* (Tex. Sup., 15 S. W. 396; *Waggoner* v. *Sigler*, supra).

As clearly shown by respondent's Complaint and the trial court's Findings, Conclusion and Judgment, neither could within a range of one to fifteen years determine when the event occurred which had the effect of *automatically* putting an end to petitioner's title, a situation in respect of which the Texas Supreme Court has said it should not be concluded "that the parties intended to prescribe a test for termination of the interests granted which could only be applied with the utmost uncertainty or confusion," and that under such conditions "neither lessor nor lessee could at any time have clearly or certainly known whether the estate granted was alive or ended" (*Waggoner* v. *Sigler*, supra).

There would appear to be no reasonable basis for the conclusion that an event the occurrence of which in relation to time is shrouded in uncertainty can be said to have had an automatic effect, a proposition which upon its face manifestly involves a contradiction. Yet, this legal incongruity must be resorted to if the conclusion of the Circuit Court is to be sustained, that " 'production' as used in the lease in question means 'production in paying quantities' ", despite the fact that respondent made no effort whatsoever to establish that the lease here involved was not productive of oil or gas in paying quantities when its primary term ended on December 7, 1925.

It would seem illogical and unsound, upon the authority of *Garcia* v. *King*, not only to impute to the contract in question here a non-existent condition

of defeasance, but to presumptively extend such imputation by its tortured application to wholly dissimilar conditions. Thus would presumption be piled upon implication, to accomplish what? The destruction of a vested estate by resort to the disfavored remedy of forfeiture, a right which respondent was required to sustain by clear, certain and convincing proof *(Decker* v. *Kirlicks* (Tex. Sup.), 216 S. W. 385).

But there is still another decisive reason why the implied limitation of title "in paying quantities" should not, upon the authority of *Garcia* v. *King*, be read into the lease here involved. In the case at bar the contract contained the express covenant that after completion of the exploratory well the lessee "*shall continue the development of said property until said property has been reasonably developed.*" What was the plain purpose of this clause, which was in no sense one of defeasance because there was no condition of forfeiture attached to non-compliance? Obviously, it was to furnish contractual assurance, in the nature of a covenant, that royalty returns would be as high as reasonably possible viewed in the light of surrounding conditions when the agreement was made. Did the breach of such an obligation render the lessor remediless? And did it not, being expressed, dictate the exclusive recourse of the lessor for its alleged breach? The answers are found in *Waggoner* v. *Sigler*, where it is said that the usual remedy for breach of a covenant for reasonable development is an action for damages, or alternatively, where there can be no other

adequate relief, a court of equity will entertain an action to cancel the lease in whole or in part. And it will be noted in this respect that respondent does not even assert that it could not thus have been fully and adequately compensated and protected for any breach by petitioner of its express covenant for reasonable development. Respondent's choice of remedies was deliberate, witnessed by the studied difference in these respects between its abandoned and trial complaints (R. 2-16).

Respondent thus chose a remedy which, rightfully, is not favored in the law *(Nelson* v. *Downtain* et al. (Tex. Sup.), 265 S. W. 135), thereby assuming the heavy burden of bringing itself precisely within the rules of law which would cause an automatic reversion to it of petitioner's vested estate and rights, as against another which would more fairly assure to both parties their rightful dues. After, all, the law is but the rule of reason, which apparently does not accord with the conduct of a party with two avenues of procedure open who selects one which cannot be sustained save by building presumption upon implication and which has the effect of wiping out another's investment and estate.

It has been repeatedly declared by the Supreme Court of Texas that a contract will be construed in accordance with its plain language (10 Tex. Jr., Sec. 163, p. 279; *Cooley* v. *Buie*, 291 S. W. 876); and that the terms of the agreement, when free from ambiguity and not in conflict with the policy of the law, establish the rights of the parties (id.; *Burns*

v. *National Life Ins. Co.*, 280 S. W. 762), citing *Insurance Co.* v. *Coos County*, 14 S. Ct. 379; 151 U. S. 452, 38 Law. Ed. 231, where this Court said:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The Courts may not make a contract for the parties." Nor may the courts by refinement of construction nor by interpolation of absent terms devolve an intent from the agreement contrary to that which is plainly expressed (*Reynolds* v. *McMan Oil Co.*, 11 S. W. (2) 778; on rehearing, 14 S. W. (2) 819).

It is most earnestly submitted that the Garcia case does not sustain the Circuit Court's interpretation of the contract here involved, and that its final affirmance will have a devastating effect upon the operators of stripper leases throughout Texas in relation to the title status of oil and gas offered for market therefrom, with the inescapable result, as soundly recognized by the Supreme Court of Texas in the Waggoner case, that "such a test must inevitably diminish—if not destroy—the value of the rights of all parties derived from a mineral lease."

The vital importance of a clear distinction between the automatic ending of a lease grounded on a limitation precisely ascertainable and the breach

of an express or implied covenant compensable in damages in relation to the title of oil or gas offered for market is emphasized by the Texas Supreme Court in *Freeport Sulphur Co.* v. *American Sulphur Royalty Co.* (6 S. W. (2) 1039), referred to by the court in *Waggoner* v. *Sigler* with the observation that "no damages could be properly awarded the lessor for any failure by the lessee to drill for or protect or market minerals *after they had reverted to the lessor under the operation of a limitation on the lessee's estate* (emphasis added). "Both decisions (*Texas Pacific Coal & Oil Co.* v. *Barker* (Tex. Sup.) 6 S. W. (2) 1031) necessarily imply that the obligations breached were covenants and not limitations."

And while it is true, as thus observed, that the lessor under the conditions stated could not recover in damages for breach of the development obligations, it necessarily follows, if the decision of the Circuit Court in the case at bar is to be upheld, that petitioner will be in the position, as will other similarly situated lessees, *of having converted all of the oil and gas taken after the automatic reversion of the leasehold estate to the lessor*, an inescapable result which underlies and emphasizes the unfailing refusal of the Supreme Court of Texas to sustain the contention that breach of an obligation to develop will operate as a limitation upon the title.

The Circuit Court says, basing its conclusions on the Garcia case, that the lease here in question automatically terminated *when* it ceased to measure up to the implied condition of production of oil or gas

in paying quantities. The Circut Court had no information of *when* this condition resulted, because neither respondent nor the trial court knew within a period of from one to fifteen years, during all of which time, however, as the Circuit Court interprets *Garcia* v. *King*, petitioner necessarily was guilty of converting respondent's oil and gas, in that it had lost title thereto, and would be liable therefor in damages at the later suit of respondent when it might convince court or jury that the conversion commenced and continued from a date certain.

Nor would petitioner be alone in this predicament. Based upon the decision of the Circuit Court, every other similarly situated stripper lease operator would labor under the same hazard, with no idea when his lessor might conclude that the time was propitious for him thus to collect.

Petitioner will not prolong the discussion under this assignment, except to again recall that it was expressly held in the Garcia case, as bearing decisively upon proper interpretation of the opinion, that because of development postdating termination of the primary term the lease was commercially productive when the case was tried, but that such circumstance would avail the lessee nothing *because his estate had ceased to exist when the term ended*, which induces the thought that turn about should be fair play. If, upon the theory of automatic reversion, posterior development operations of the lessee become irrelevant, application of this rule, invoked by respondent in reliance upon *Garcia* v. *King*, would

render wholly immaterial all evidence offered by it relating to petitioner's activities since December 7, 1925, when the primary term of the lease here involved expired.

If, as asserted by respondent and the Circuit Court, the principles announced by the Texas Supreme Court in *Garcia* v. *King* are sound as applied to the case at bar, it is difficult to follow reasoning which would attribute to alleged lack of commercial production occurring *after* the primary term the effect of an automatic ending of petitioner's title. Respondent pitched its case upon the automatic cessation of petitioner's title. The trial court so found and adjudged, although obviously uncertain of when the event occurred, as was respondent itself. The Circuit Court expressly approved such findings and conclusions, with the same attendant uncertainty. In developing its theory, respondent introduced a mass of evidence none of which even purported to relate to conditions existing on December 7, 1925, when the primary term ended. In fact, the only evidence that could by the remotest stretch of the imagination bear directly upon respondent's theory was the testimony of its witness WALKER, an accountant, whose conclusions, based upon petitioner's income tax returns, were confined to the years 1941, 1942 and 1943 (R. 152, 154, 155). Respondent's suit in the state court was filed November 8, 1941 (R. 181). It is not even contended that the testimony of respondent's other witnesses related to conditions save those existing immediately prior to the trial.

Thus, in the light of the decision upon which respondent and the Circuit Court rely, the evidence adduced by the former is without relevance to the determinative question involved, as respondent elected to ground its case, i. e., was there *when the primary term ended* a lack of commercial production of oil or gas, to afford a legal basis for adjudging its automatic termination?

Petitioner most earnestly submits that no Texas decision supports such a conclusion, and that the true rule applicable to the undisputed facts here is announced in *Waggoner* v. *Sigler*, *Watson* v. *Rockmill* and *Decker* v. *Kirlicks*, each of which petitioner has attempted to analyze in the preceding discussion and in the petition for certiorari.

THE SECOND ASSIGNMENT OF ERROR

This is the first instance within petitioner's information in the judicial history of the natural gas industry that a lease has been cancelled on the ground of its commercial unproductivity under conditions where it is conceded that gas had been regularly produced from it and marketed for more than a decade through an established pipe line, resulting no doubt from the circumstance that hitherto it had never occurred to any lessor that the commercial productivity of a lease so conditioned could be questioned. In all of the cases to which petitioner's attention has been directed in this respect the issue arose where gas in substantial quantities had been

discovered but no market was available and no outlet had been provided prior to termination of the fixed term. In many such leases there was contained a specific provision for production of oil or gas in paying quantities. But, whether or no, it has uniformly been held that when the stated period ended and the lessee was not actually marketing gas, whether for lack of pipe line connection or otherwise, the estate automatically terminated.

Establishment of the principle that regular deliveries of substantial amounts of gas to an established pipe line is conclusive of the commercial productivity of the lease from which it is taken is vitally essential to the independent producer. Otherwise, as petitioner will endeavor to show, the lessor is placed in the position to cancel the lease almost at will, particularly after expiration of the defined duration period.

Such a producer has no control over well spacings, a responsibility confided to public authority. Unlike the producer of oil, he has no voice in the quantity of gas which the purchaser might elect to take within the maximum limits provided by law. The oil producer can resort to truck transportation if no pipe line is available, or if the terms and price offered are unsatisfactory. But the gas producer is dependent wholly upon pipe line transportation. If it should happen that his lease consists of only 640 acres and is situated in a territory where he may not lawfully drill more than one gas well thereon and is probably only one of hundreds of other producers

from whom the purchaser secures its market requirements, or however else he may be situated, there is nothing for him to do but accept what the fates decree.

In short, the independent producer of natural gas is peculiarly the subject, and quite frequently the victim, of public and private regulation. But his lessor is governed by the same statutory and economic laws. In the very nature of the gas business the purchaser cannot buy in large volume from a particular well or lease, not only because of the conservation laws and the rules of regulatory bodies, but based upon the practical necessity of maintaining great reserves to meet the exigencies of market requirements, the economic foundation for important securities payable over a long period of years, thus foreclosing the possibility that returns from the sale of gas to any one such producer can be much more than a "pittance," measured by the large profits received from oil production.

In most instances, particularly in the Southwest, the independent producer does not deliberately drill a gas well because of prevailing low at-the-well prices. When such does result, usually in connection with oil exploration, it is considered untoward, but better than nothing, in that the returns will necessarily be small, perhaps insignificant, compared to the cost of drilling and completing the well, although with the saving prospect of continuance over many, many years and the more important controlling consideration that there is no expense

attached to its production and marketing. After his well has been connected to the pipe line, any volition on the part of the producer ends. Both he and his lessor receive their periodical checks from the purchaser pursuant to required division orders, with which the chapter endeth until the well permanently ceases to produce.

Most, if not all, of these considerations are judicially known to the Court *(Reynolds* v. *McMan Oil & Gas Co.* (Tex. Supreme), 11 S. W. (2), 778, 784). This Court upon many occasions, in relation to the gas industry in Texas, has upheld the principle that private rights will be subordinated to a reasonable exercise of the state's police power, so peculiarly necessary in the production and marketing of natural gas (Consolidated cases, 300 U. S., 55; 57 Sp. Ct., 364; 81 Law Ed., 510-24).

The declared primary purpose of Texas natural gas conservation enactments (Vernon's Texas Civil Statutes. Arts. 6008 et seq., at p. 192; and Arts. 6050 et seq., at p. 287), pursuant to constitutional authorization (Art. 16, sec. 59a) was to prevent above or *underground* waste of this irreplaceable product, with the result that in the absence of some compelling operational reason the Texas Railroad Commisison in its administration of the Natural Gas Act will not permit disconnection of gas wells from pipe lines if the consequence will be to leave in the ground unproduced and unproducible natural gas which the pipe line is willing to take and market. Not only that, but it would appear to be an unjustified eco-

nomic waste to bring about any such result at the suit of a lessor who deliberately elects that course over the less harsh remedy of a suit for damages, if the lessee had in fact been derelict in performance of the covenant to reasonably develop.

Wherefore, petitioner most earnestly urges that the decision of the Circuit Court in this case will be greatly injurious in its effect upon the title status of literally thousands of independently operated gas leases in Texas, and will raise a most serious question of the lawful marketability of natural gas therefrom. The ramifications of the natural gas industry have to such an extent become nation-wide and are so interrelated with many other phases of the national economy that the questions reflected by this record therefore assume a general importance peculiarly justifying their authoritative determination by this honorable Court.

Copies of the within petition for rehearing have this February ....., 1946, been mailed to Knox Miller, Esq., Alamo National Building, San Antonio, Texas, attorney for respondent, for use of himself and associate counsel.

WHEREFORE, because of the matters hereinbefore and in its petition for certiorari set forth, petitioner prays that a rehearing be granted, and that there-

upon the Court will accord it such relief as the record may justify.

Respectfully submitted,

ARTHUR H. BARTELT,
Attorney for Petitioner,
Austin, Texas.

FAGAN DICKSON,
Of Counsel,
Austin, Texas.

Certificate of Good Faith

The Attorney presenting this petition for rehearing certifies that the same is presented in good faith and not for delay.

ARTHUR H. BARTELT
Attorney for petitioner.

NO. 653

IN THE

Supreme Court of the United States

OCTOBER, 1945, TERM

GAS RIDGE, INC.

Petitioner

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.

Respondent

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

SECOND PETITION FOR REHEARING

ARTHUR H. BARTELT
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303 Nalle Building
FAGAN DICKSON, Counsel
Austin, Texas

FARM FOUNDATION—AUSTIN

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SUBURBAN AGRICULTURAL PROPERTIES, INC.
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MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Comes now petitioner herein by its counsel and moves this Court for leave to file a second petition

for rehearing primarily on a ground heretofore not submitted, the motion being hereto attached and made a part hereof.

Dated this ..... day of March, 1946.

.....

ARTHUR H. BARTELT
Attorney for Petitioner
303 Nalle Building

.....

FAGAN DICKSON, Counsel
Austin, Texas

NO. 653

IN THE

Supreme Court of the United States

OCTOBER, 1945, TERM

GAS RIDGE, INC.
Petitioner

v.

SUBURBAN AGRICULTURAL PROPERTIES, INC.
Respondent

SECOND PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Comes now Gas Ridge Inc. with leave of this Honorable Court being first obtained and files this, its second petition for a rehearing, and petitions this

Court to vacate and set aside its decision denying Gas Ridge, Inc.'s petition for certiorari upon the following new grounds:

The Decisions of the District and Circuit Court of Appeals Are Founded upon a False Issue Due to Respondent's Attorney Misquoting Term Clause in Lease when Requested by District Court Judge to Write the Court's Findings.

The cancellation of the oil and gas lease is the sole subject of this litigation involving its term clause alone which provides "for the term of five years from this date and as long thereafter as *oil* OR *gas* is produced from said lease premises etc." Plt. Ex. 1, Ex. Appendix pp. 1 and 2. Copy is to be found on pp. 43 to 47 in petition for certiorari.

The Findings of Fact and Conclusions of Law quote the same term clause but change the connective OR to AND. The Circuit Court of Appeals approved the Findings of Fact and Conclusions of Law, even though its attention was called to the misquoting both by appellant in its briefs and by Judge Sibley in his dissenting opinion.

It makes a decided difference under the existing facts and conditions surrounding this lease, as will be shown later, whether both oil and gas or only either oil or gas must be produced in order that the lease may be extended beyond the primary term of five years when it is admitted by the plaintiff in its pleadings that there has been and still is con-

tinuous production of natural gas. (Tr. R. p. 19) Therefore, that admission decides this case because the plain language of the term clause uses the connective OR instead of AND between the words "oil" and "gas." Petitioner is therefore entitled to a decision based upon the language of the lease term clause and not upon a misquoted term clause, in order to meet the requirements of the due process of law.

The following are the instances in which the misquoting appears in the records.

In plaintiff's two complaints in the District Court,

that is, the first (Tr. R. 5) and second amended (Tr. R. 19) complaints.

The lease was offered in evidence, Tr. R. 34, by the plaintiff's counsel, Knox Miller, and is Plaintiff's Exhibit I in Exhibit Appendix, pages 1 and 2. The term clause in it contains the word OR and not AND. There is therefore no dispute that the term clause in the original lease contains the connective OR and not AND.

On September 26, 1944, the Honorable W. A. Keeling, judge of the District Court, now deceased, rendered a memoranda opinion stating that upon the merits of the case the Court rendered judgment in favor of the complainant and further stated that in the event defendant intended to appeal, then the Court requested complainant to prepare Statement

of Facts and Conclusions of Law. Tr. R. 176. Defendant objected to this and called the Court's attention to District Court Rule No. 52 which requires the Court in court trials to write its Findings of Fact and Conclusions of Law. However, the judge did not change his order.

Complainant's attorney did prepare the Findings of Fact and Conclusions of Law, mailed a copy to defendant's attorney, which the latter still has, and submitted them to Judge Keeling, the District Court Judge, who signed them just as prepared by plaintiff's attorney without making a change of any kind whatsoever.

The changing of the connective OR to AND in quoting the term clause of the lease is to be found in Findings of Facts No. 2, Tr. of R. 177. Then once in Findings of Fact 9 and 12 (Tr. R. 180-181) and twice in the Findings of Fact No. 11 (Tr. R. 180) the findings use the phrase "to produce oil and gas in paying quantities." Throughout all the Findings of Fact and Conclusions of Law, when mentioned, production is spoken of in the aggregate. Thus clearly the District Court's decision is based on a lease provision not contained in the lease, the subject of this litigation.

Appellant, in its brief filed in the Circuit Court, pages 76 to 80, and in its reply brief, pages 29 to 32, called attention to the fact that the lease in its term clause contained the connective OR and not AND and that therefore, the gas operating expenses be-

ing inconsequential, the gas production held the lease in force under the decision of the Supreme Court of Texas in *Garcia* v. *King*, 164 S.W., 2d 509, in which that Court said "If a well pays a profit, even small, over operating expenses, it produces in paying quantities, although it may never repay its cost, and the enterprise as a whole may prove unprofitable."

Appellant, in the Circuit Court, in its Supplemental Petition for Rehearing in the Circuit Court of Appeals, page 8 in the brief and page 236 in the Transcript of Record says:

> "The Court's attention is again called to the fact that the language of the lease is 'as long as oil OR gas is produced' and is not as 'long as oil AND gas is produced.' "

This was followed by the dissenting opinion of Judge Sibley in which he said:

> " . . . . The motion for rehearing stressed the point that the lease continues so long as oil OR gas is produced, the lease having been misquoted by the trial court, and the difference having been overlooked by us. I think the point is well taken. There is no fact-finding that the six gas wells operate at a loss, and the evidence does not show it. The finding is that each of the twelve oil wells costs three times as much to operate as a gas well. It may well be that the gas wells pay, and if so the lease is not at an end. Unless the lessor, who is the plaintiff, establishes that neither oil nor gas is produced in paying quantities, he is not entitled to cancel his lease. . . ."

Respondent has the burden of proof. *Pershy* v. *First National Bank*, 117 S. W. 2d 861.

Respondent filed a motion to dismiss petitioner's petition for certiorari. In petitioner's reply to that motion, pages 7 and 8, it is said:

> "Respondent makes no attempt to explain its misquoting of the term clause in the lease."
>
> "Was this just an oversight and if so, why has it happened several times?"

Undoubtedly the Honorable W. A. Keeling, now deceased, must not have been informed of the misquoting of the term clause of the lease, as has just been shown, or he never would have signed these Findings with misquotation.

If Knox Miller did not know at the time he handed the Findings of Fact and Conclusions of Law to Judge Keeling that the term clause was misquoted, then when he did discover the error, either by himself or when it was pointed out to him by appellant's briefs, it became his duty to have called Judge Keeling's attention to the mistake immediately and if the Judge was at that time deceased, it became Miller's duty to have called the Circuit Court's attention to the error, either in his brief or otherwise, and it was also his duty to this Court to have made mention of the misquotation in his reply to respondent's petition for certiorari. But as to this, plaintiff's attorney has never attempted to make an explanation to anyone. Does not that present to this Court

a supervisory question of court decorum and changing of court records basic to the maintaining of the utmost confidence between courts and attorneys and to truth and justice, one that transcends every other issue in this case?

If plaintiff's attorney knowingly wrote and submitted to Judge Keeling the Findings of Fact and Conclusions of Law with the word OR changed to AND in the term clause of the lease, that constituted a fraud perpetrated upon the Honorable Judge W. A. Keeling, the Circuit Court of Appeals, and this Court and also constituted a fraud upon petitioner.

The Changing of the Connective OR to AND Makes a Vast Difference in this Case

There is a very great difference in production cost between "as long as oil OR gas is produced" and the misquoted phrase "as long as oil AND gas is produced." Therefore, that difference brings about a great change in the length of time the lease extends after the end of the primary term.

When an oil well approaches depletion it does not flow of itself but must be pumped by costly machinery and must be kept in repair, the pumping requiring gasoline and the daily attendance of at least one operator. If there is no oil pipeline extending to the wells, as is the situation as to the lease and field in the case at bar, then there is the additional

cost of trucking it to the refinery. The gas in a gas well, so long as it is produced at all, lifts itself by its own expansive power from the producing structure to the surface and is picked up right on the lease by the pipeline of the company that buys the gas. Therefore, there is no transportation cost nor pumping, no machinery to be purchased and kept repaired, no labor. Yet in spite of this difference and the fact that the term clause uses the word OR and not AND, the District Court, throughout all its findings uses the connective AND and makes the test upon which it decides the case that there must be production of both oil and gas in paying quantities. The phrase "in paying quantities" is not contained in the term clause but assuming it were, the lease is continued

and still in full force and effect because it is admited that there has been continuous production of gas whose operating cost is about nil. The amount has been shown in plaintiff's reply brief in this court. Addendi IV and V, pages 51 and 52.

In the Circuit Court of Appeals, in the motion for rehearing, Judge Sibley calls attention to the oversight in assuming that the term clause uses AND instead of OR and holds that the gas production extends the lease because plaintiff offered no proof as to amount of gas produced. The majority of the Court denied the motion for rehearing without making an explanation on this point. Consequently, in the Circuit Court of Appeals the decision of the District Court on a false term clause, one not contained in the lease, is affirmed.

The result of all this is that there never has been a judicial determination, outside of Judge Sibley's dissent, of the term clause in the lease, Plaintiff's Exhibit 1, in the District Court. Thus petitioner's property has been taken without the due process of law guaranteed to it by the Fifth and the Fourteenth Amendments of the Constitution of the United States and without such judicial determination the taking of petitioner's property could not be justified. *Fayerweather* v. *Ritch*, 195 U. S. 276.

This Court's Denial of Petitioner's Petition is in Direct Conflict with Its Own Opinion in the Case of East N. Y. Savings Bank v. Hahn, et al

On November 5, 1945, this Court, in the case of *East N. Y. Savings Bank*, 90 L. Ed. 9, held that:

> "It ('this protective power of State,' described in 290 U. S. at 440) may be treated as an implied condition in *every contract* as though it were written into it."

But the Court of Appeals approved the District Court's finding, namely:

> "Since the lease contained no saving clause but fixed precisely the terms upon which its continuance depended, these constituted no defense." Tr. R. p. 196.

It is not understandable at all, after such unlimited and clearly expressed a pronouncement by this Court that so soon thereafter it now excludes an oil

and gas lease contract from its foregoing rule. Certainly a war is as much of an emergency as a financial depression.

Under the war OPA rule defendant was stopped from completing its drilling program of 15 shallow oil wells after it brought in its seventh producer.

On pages 30 and 31 of Pettioner's Brief in Respondent's Reply, is to be found a brief statement showing how the war handicapped defendant's oil production.

Why does "the implied condition" not apply to the oil and gas lease contract in this case?

The affirmance by the Court of Appeals of the District Court's Finding that the oil and gas lease contract is immune from the directives of the President and OPA presents a syllogistic dilemma with but two alternatives, that is, either the Court of Appeals has

(a) decided a Federal question directly in conflict with a decision of this Court or

(b) decided an important Federal question which has not been, but should be settled by this Court.

Changing OR to AND in the Term Clause of the Lease Contract, that is, Changing the Second Phrase from an Alternate to a Limiting One by a Court Means Rewriting the Contract, Something Unauthorized Not Only in Texas but by All Courts

The Circuit Court of Appeals, by its decision, changed OR to AND, thus usurping a power it did not possess. To sustain that action by silence means in effect rewriting the Texas law of contract just as much as saying it in so many words. Local law controls the interpretation of Texas contracts and the point raised by petitioner. Federal courts are powerless to override decisions of Texas courts and must follow Texas decisions. *Erie* v. *Thompkins*, 58 Sup. Ct. 817.

> "Accordingly the courts have often said that they cannot make a new contract for the parties nor add to, *modify*, *vary* or *change* in any particular the contract made." 10 Tex. Jur. 279, with many cases cited.

At no time have respondent, the District Court or the Circuit Court of Appeals cited a single Texas case or a case from any other jurisdiction sustaining their rewriting of the Term Clause in that lease.

The Circuit Court of Appeals therefore decided an important local question in a way in conflict with Texas court decisions. This invokes the jurisdiction of this Court.

When the Court of Appeals Says "Production" Means in "Paying Quantities" It Denies Petitioner Its Constitutional Right of Contract.

The Circuit Court said "that 'production' as used in the lease in question means "production in paying quantities." That means it is impossible for par-

ties to an oil and gas lease to write a lease in which the term may be extended by the word "production," limited to what the word means by itself. To make such a lease contract is prohibited neither by statute nor by public policy.

Thus the decision of the Court of Appeals denies to lessee, the petitioner, its constitutional right under the 5th and 14th Amendments to make a contract as it chooses so long as it is not prohibited by statute or is not against public policy.

WHEREFORE, upon the foregoing grounds and those set out in the original petition of rehearing, it is respectfully urged that the petition for rehearing be granted and that the judgment of the Circuit Court of Appeals be upon further consideration reversed.

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Certificate of Good Faith

The attorney presenting this petition for rehearing certifies that the same is presented in good faith and not for delay.

ARTHUR H. BARTELT